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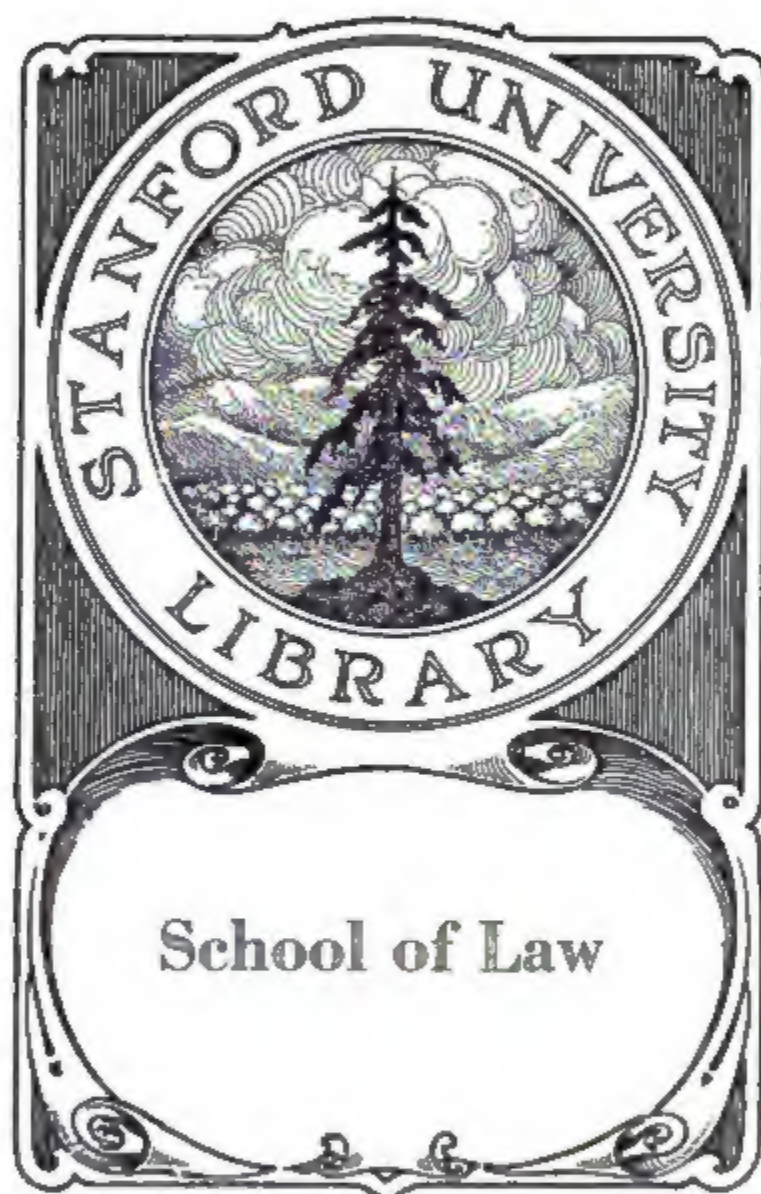
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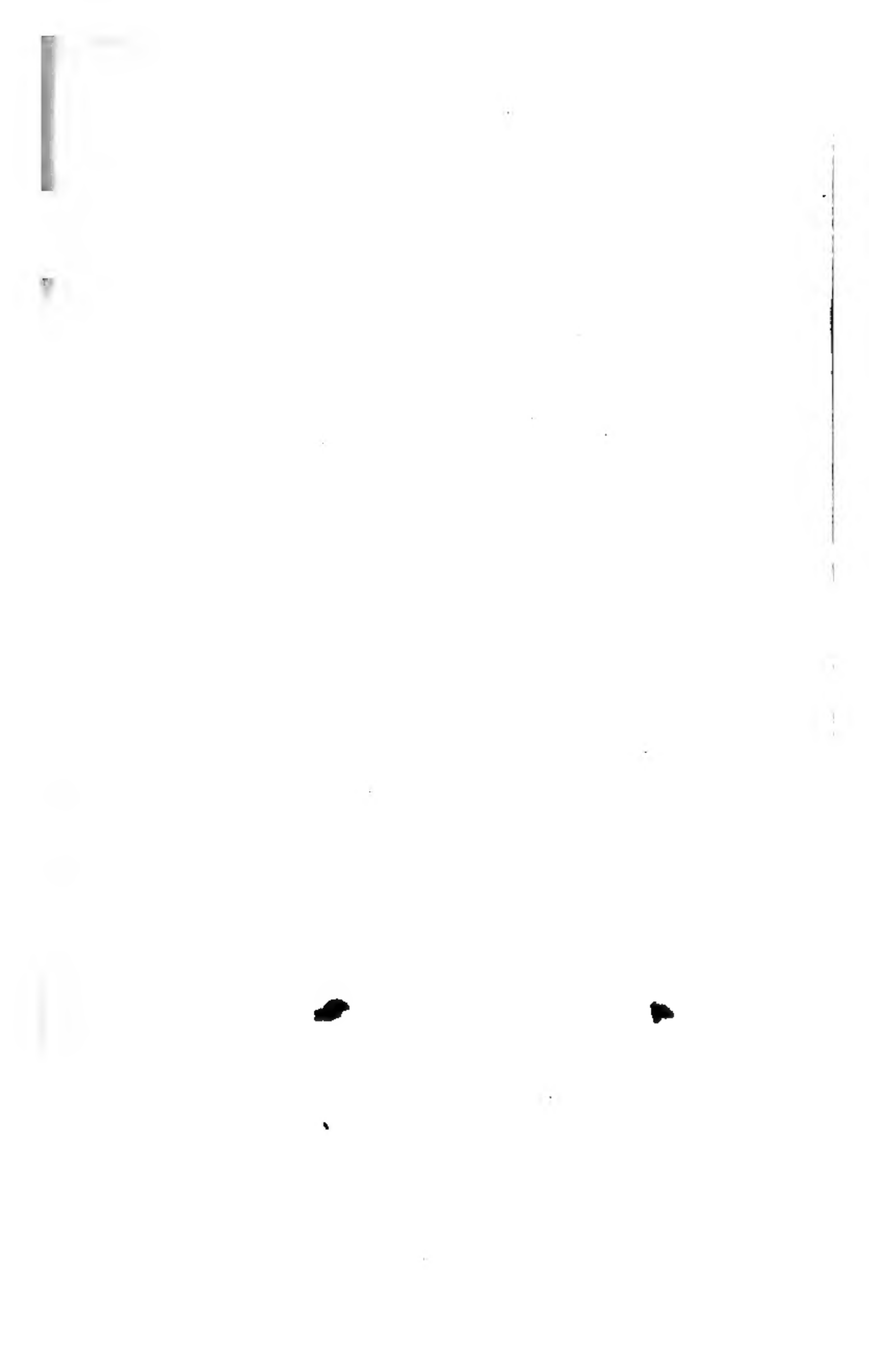
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(1884)



THE
CANADIAN
2160
LAW TIMES

Edited by
E. DOUGLAS ARMOUR,
Of Osgoode Hall, Barrister-at-Law.

VOL. VI.

TORONTO:
CARSWELL & CO., PUBLISHERS.
1886.

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PRINTED BY
MOORE & CO., LAW PRINTERS,
20 ADELAIDE ST. EAST,
TORONTO.

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THE CANADIAN LAW TIMES.

VOL. VI.

JANUARY, 1886.

No. 1

ENGLISH PATENT LAW CONSIDERED IN CONNECTION WITH THE PATENT ACT OF 1883.

TO trace the origin of letters patents, it is necessary to go back to the days of the Plantagenet and Tudor Kings, when the merchants and traders of those times, associating together, formed guilds for the purposes of trade and commerce. As these guilds rose in wealth and importance in the country, the monarchs of those periods, suffering as they did in the majority of instances from impecuniosity, were not slow to turn them to their own advantage, by granting to them exclusive charters and privileges in trading in exchange for the monetary advances which they from time to time received from them. In the course of years, as increase of commerce brought wealth to the individual members of these guilds, we find the privileges and monopolies, which originally were only granted to associations in their corporate capacity, being extended to such of their members as were in a position and disposed to advance to their sovereign such sums of money as he, in his necessities, required.

In the reign of Queen Elizabeth the royal prerogative of granting monopolies was stretched to its utmost limit, and notwithstanding that towards the close of her reign she cancelled many of the most oppressive, we find that in the reign of James I. the grievances occasioned by those

monopolies which still existed were so strongly felt that it was deemed necessary by the Legislature that the rights of the Crown in respect of granting letters patent should be defined by statute. This resulted in the passing of the Act 21 James I. cap. 8, known as the Statute of Monopolies.

The preamble to this Act having set forth that many grants and monopolies had been obtained and unlawfully put in execution to the great grievance and inconvenience of the King's subjects, and contrary to the King's intention, it was declared by the first section of the Act, "that all grants of monopolies and of the benefit of any penal laws, or of power to dispense with the law, or to compound for the forfeiture are contrary to your Majesty's laws, while your Majesty's declaration is truly consonant and agreeable to the ancient and fundamental laws of this your realm. * * * That all monopolies, and all commissions, grants, licenses, charters and letters patent heretofore made or granted, or hereafter to be made or granted * * * are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in nowise to be put in use or execution." Section 6 of this statute, however, saved and excepted the granting of letters patent to inventors by providing:—"That any declaration before mentioned shall not extend to any letters patent and grant of privilege for the term of fourteen years or under, hereafter to be made of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making of such letters patent and grants shall not use, so as also they be not contrary to the law, nor mischievous to the State by raising of prices of commodities at home, or hurtful of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this Act had never been made and of none other." From this it is seen that the granting of letters patent is not expressly warranted by the Statute of Monopolies, as it

simply reserves to such letters patent as come within the terms of the before mentioned exception such force as they should have had if the Act had never been made and none other force. But as all grants of exclusive privilege by letters patent which do not fall within this exception and some others of little importance are now rendered void by the statute, the construction of this exception has become a matter of great practical importance (a).

By the Patents, Designs and Trade Marks Act of 1883, which came into operation on the first day of January, 1884, all prior statutes relating to patents (and their number was considerable) were repealed, with the exception of the Statute of Monopolies, of which only sections 10, 11 and 12 were rescinded. Although by the new Act changes have been wrought in connection with the law of patents, nothing whatever has been done to interfere with the Crown's ancient prerogative of granting or withholding the grant of letters patent, this right being specially saved by the 116th section of the present Act. An important change, however, has been effected as regards the Crown's right of user by rendering a grant of letters patent operative equally against the sovereign and her heirs and successors as against an ordinary subject (b). Until the coming into operation of the present Act the Crown was never bound by its grant as against itself, the patent only running in favour of the subject as against other subjects; therefore the Crown was at perfect liberty to make use of any invention of which it had granted letters patent without in any way recognizing any right of the inventor or patentee, or being under any obligation to remunerate him for so using it. It may be noticed, in connection with this right, that although the right of user was extended to the Crown, the latter had no power to delegate the right to a contractor, as distinguished from a servant employed to manufacture the patented article; and in such an event the same proceedings might be taken against the contractor, for in-

(a) See Williams on Personal Prop.

(b) This provision is not retrospective, and only applies to letters patent granted since the 1st January, 1884.

fringement, as against any other ordinary subject. The two modes of infringement were, first, by making and vending, and second, by using; and the fact that the Crown infringed the patent, in the second instance, in no way lessened the liability of the contractor in respect of the first infringement.

The 27th section of the Act of 1883 has, however, abolished this right of the Crown to use a patented invention for the public service without remuneration to the inventor, and a patent has now, to all intents, the like effect as against the sovereign and her heirs and successors as it has against the subject. But the officers or authorities administering any department of the service of the Crown may, by themselves, their agent, contractor or others, at any time after application, use the invention for the service of the Crown on terms to be before or after the use thereof agreed on, with the approval of the Treasury, between those officers or authorities and the patentees, or in default of such agreement on such terms as may be settled by the Treasury, after hearing all parties interested.

The 46th section of the Act defines the term patentee as "the person for the time being entitled to the benefit of the patent." Accordingly, the person represented by the term may either be the original grantee, his executors or administrators, or the assignee of the original grantee; and any person, whether a British subject or not, may become a patentee, and incapacity, whether of infancy or otherwise, in no way operates as a bar to obtaining a grant of letters patent by the person applying. A patent, moreover, may be granted jointly, where two or more persons make a joint application for the same (c).

In the event of a person possessed of an invention dying before making an application for a patent for the invention, application may now be made by, and a patent for the invention granted to his legal representative; but every such application must be made within six months of the decease of such person, and must contain a declaration by

(c) Sec. 4, Pat. Act, 1883.

the legal representative that he believes such person to have been the true and first inventor of the invention (*d*). This is entirely a new feature in patent law, as, previous to the coming into operation of the present Act, such a grant would not have been made, it having been decided in the case of *Marsden v. The Savile Street Foundry and Engineering Co.* (*e*), that the administrator of a deceased inventor was not entitled to letters patent. This decision was undoubtedly a hard one, and entailed possibly in many instances a heavy loss to the deceased inventor's estate. The evil is, however, now remedied, and the legal representative of the deceased inventor is in such cases entitled to the grant (*f*).

In order to support the validity of a grant of letters patent, it is still essential that the patentee should conform to the requisites of the 6th section of the Statute of Monopolies. In the first place he must be the "true and first inventor of a new manufacture," and the important part which this fact plays in obtaining the grant is shown, as already seen, in the necessity that the legal representative of a deceased inventor shall declare his belief to that effect.

The second requisite necessary to support the grant is that the invention be new and useful, and as it is upon these requirements that the validity of the grant is hinged, it is at once apparent that it becomes an all important matter to arrive at the true and accepted definitions of the several terms.

The present Act nowhere defines the term "inventor," but uses the word just as it has been hitherto used in previous Acts. In the general acceptance of the term an inventor is one who either accidentally, or designedly, produces, or discovers an art or manufacture. The definition "true and first inventor," in its legal sense, has, however, a larger and wider interpretation placed upon it than that generally implied by the term "inventor;" and though its legal interpretation takes within its scope the meaning

(*d*) Sec. 34, sub-secs. 1 and 2, Pat. Act, 1883.

(*e*) L. R. 3 Ex. D. 203.

(*f*) Sec. 32, sub-sec. 2, Pat. Act, 1883.

generally accepted, we nevertheless find other persons included, in whom the practical principles of an invention certainly cannot be considered first to have originated. For instance, we find any one who first imports from abroad an invention not previously known here, coming within the definition; also, where two or more persons invent the same thing independently at the same time, it is he who first takes out the patent that is considered the first and true inventor; and any one who renders practically useful an invention not previously known as part of the common knowledge of the State, or not previously practicable, also comes within the same category.

To support the title of one who first suggests the practical principle of an invention as the first and true inventor, it is necessary that his specification should describe something which is not already known and used. The information which he gives to the public must not, however, be derived from books or oral communication (*g*), neither must he borrow his invention from another person or learn it from a specification (*h*); but if he originally suggests the principle, though some one else may subsequently help him to carry out the idea, he is still deemed the first and true inventor (*i*); and even though discoveries and suggestions accessory to the main principle, but which tend to the better carrying out of the invention, may be made by workmen in the course of carrying out the principle, he is still entitled to be considered the first and true inventor, and the discoveries and suggestions of the workmen become his property (*j*); should the invention have originated with the workman, then of course the workman's subsequent discoveries and suggestions remain his property (*k*).

A communication made in England by one British subject to another of an invention, cannot be patented so as to

(*g*) *Stead v. Williams*, 2 Webster's Pat. Cases, 130 (1843).

(*h*) *Gibson v. Brand*, 1 Webster's Pat. Cases, 627 (1842).

(*i*) *Minter v. Wells*, 1 Webster's Pat. Cases, 132 (1834).

(*j*) *Allen v. Ranson*, 1 C. B. 551 (1845); *Makepeace v. Jackson*, 4 Taunt. 770, (1818).

(*k*) *R. v. Arkwright*, 1 Webster's Pat. Cases, 64 (1785); *Barker v. Shaw*, Goodeve's Pat. Cases, 14 (1823).

make the recipient of the communication the first and true inventor within the meaning of the Statute of Monopolies, except where, as we have already seen, such communication has come to the legal representative of a deceased inventor, to whom letters patent will then be granted. It may be here mentioned that if an applicant, after sending in an application for a patent, dies before the expiration of fifteen months from the date of application, the patent may then be granted to his legal representative, and sealed at any time within twelve months after the death of the applicant (l).

With regard to the class of persons whom the law has included in the term "true and first inventor," other than the originator of the first practical principle, it certainly strikes one as somewhat stretching the interpretation of the term, to include within it one who by chance may be fortunate enough to be the first importer of the article sought to be patented; and it is difficult to see upon what principle a person who has not invented anything, but has merely imported from abroad into this country the invention of another, can be treated as being the first and true inventor; and though it has been judicially decided that such importer comes within the definition of the term, it has never yet been discovered upon what principle such definition was first arrived at, for neither by judicial, nor other authority whatever, has it apparently been declared. Indeed, it seemingly rests upon no particular principle, and, doubtless, must be included among those anomalous decisions which have acquired by time and recognition the force of law (m).

Upon the publication of the present Act, it was apparent, that, whether by intention or not, it abolished by implication the right which had hitherto existed of granting to importers letters patent of inventions received by, or communicated to them from abroad. The Act declared, and does still declare, that any person, whether a British subject or not, may apply for a patent, and that such

(l) Sec. 12, Pat. Act, 1883, sub-sec. (6).

(m) *Marsden v. Savile St. Foundry Co.*, L. R. 3 Ex. D. 203.

application must contain a declaration to the effect that "the applicant is in possession of an invention whereof * * * he claims * * * to be the true and first inventor." Now whatever interpretation may have been put upon the expression "new manufacture" referred to in the 6th section of the Statute of Monopolies, by which an importer has been construed as coming within the term of first and true inventor, it is evident that, though judicial decisions have given him the benefit of that construction, they would in no way entitle the importer to make the declaration prescribed by the present Act to be made by all applicants for grant of letters patent (n). At the time when the interpretation of "first and true inventor" was extended to importers, no declaration was required, or if required, the declaration was of a special form, wherein the importer declared that he claimed letters patent for a communicated invention; but in the schedule to the present Act no such declaration exists, nor has there been any provision made by which letters patent could be granted to importers. The opinion, therefore, generally prevailed up to a late date that it was intended to exclude importers from the benefits which they had hitherto enjoyed, and to which in very many cases they had no right. In December, 1883, however, when the Rules under the Act were issued, there appeared amongst them a somewhat curious form of declaration, wherein the declarant states "that he is in the possession of an invention, which invention has been communicated to him from abroad, and that he claims to be the true and first inventor thereof," and by this inconsistent document, wherein the importer declares in the first place that which is tantamount to saying that he is not the true and first inventor. and in the next the exact opposite, an importer is still enabled to obtain a grant of letters patent to the same extent that he could do before the present Act came into operation.

(n) In the case of *Milligan v. Marsh*, 2 Jur. N. S. 1083, it was held by the late Lord Hatherly (then V. C. Page-Wood) that a person taking out a patent and making a declaration that he was the first and true inventor, when in truth he was only an importer of a communicated invention, made a false declaration, and the patent was void.

This right of importers to secure patents in respect of foreign inventions seems scarcely fair to a foreign inventor, for as the latter is privileged to obtain letters patent in the United Kingdom, in respect of his invention, to him alone should be reserved the right of obtaining the grant ; whereas, at the present time, if an inventor has not had the foresight to protect his invention in this country, it is open to the first person who has discovered its utility, to import it into this country, obtain letters patent, and convert the outcome of another man's mind and labour to his own advantage. It must be borne in mind that though many of the importers within this realm, who reap the benefits offered by the patent law to importers are Englishmen, it is not essential that they should be so, for it is quite competent for the importer to appear in the character of a fellow-countryman of the inventor ; for inasmuch as the letters patent will be granted to an alien resident abroad for an invention communicated to him by another alien, also resident out of this country, all that is necessary to clothe him with the garb of an importer is proof of the introduction into this country of the article to be patented.

The present Act does certainly afford, to some extent, protection to foreign inventors against importers, for now, where any arrangement has been come to by the Crown with the Government of any foreign State for the mutual protection of inventions, any person who has applied for protection for any invention in any such State is entitled to a patent in this country for his invention, in priority to other applicants, such patent bearing the same date as the date of the protection obtained in the foreign State (o).

The patentee must, nevertheless, apply for the patent in this country within seven months from his application for protection in the foreign state with which the arrangement is in force, and until the expiration of the seven months from the date of the foreign application, no person adopting such foreign invention can obtain a vested right therein ; and, moreover, if he avail himself of the same, he will be ousted upon the original inventor applying for the patent.

(o) Sec. 103, Pat. Act, 1883.

The advantages offered by the above provision are also extended to residents in the British Colonies and possessions, as well as to foreigners, where arrangements have been made for the protection of inventions (*p*). Under this provision, however, no foreign or colonial patentee is entitled to recover damages for any infringement happening before the date of the actual acceptance of the complete specification in this country. Where mutual arrangement for protection has not been come to between this country and other foreign States, then, of course, there is nothing to prevent the importer from obtaining letters patent in respect of the invention.

The knowledge of an invention sought to be patented by an importer must not be acquired or taken from a book published abroad, for in such an event letters patent will not be granted in respect of the invention, provided any copy of the book has come within the realm, and the publication has become known to a sufficient part of the public in this country to destroy the novelty of the invention. What is sufficient publication in such a case is, of course, a matter of evidence, to be decided by the Court.

It has already been stated that a patent may be granted jointly to two or more persons, and such joint patent may be granted in the case where the patentees are respectively an adult and a minor. Where the patent is granted to two or more persons, each is entitled to use the same, irrespective of the other, or others, and may sue alone in case of infringement, or for damages, without joining his co-owners (*q*).

If two or more persons invent simultaneously the same thing in this country, independently of each other, the first that takes out a patent is held to be the true and first inventor. In such a case, the present Act provides that where an application for grant of letters patent has been made, but before the grant has been sealed another application is made, accompanied by a specification bearing

(*p*) Sec. 104, Pat. Act, 1883.

(*q*) *Shehan v. Great Eastern Ry. Co.*, L. R. 16 Ch. D. 59.

the same or similar title, the examiner of patents shall report to the comptroller whether the specifications appear to him to comprise the same invention, and if he reports in the affirmative, the comptroller must give notice to the applicants that he has so reported (*r*); and upon such affirmative report the comptroller determines, subject to appeal to the law officer (*s*), whether the invention comprised in both applications is the same, and if so, he may refuse to seal a patent on the application of a second applicant (*t*). Under section 13 of the Act, every patent is to be dated and sealed as of the day of application, but no proceedings can be taken in respect of any infringement committed before the publication of the complete specification; but in the case of more than one application for a patent for the same invention, the sealing of a patent on one of these applications does not prevent the sealing of a patent on an earlier application. The result of this is, that if the first applicant proceeds with his patent, it will, upon being sealed, oust the patent obtained by the second applicant, who will have had notice given him (*u*) of the risk he ran from prior application, before he applied for the sealing of his patent. By the operation of the last-mentioned section of the Act, the decision in *ex parte Bates & Redgate* (*v*) is annulled. In that case it was held that leaving a provisional specification, and obtaining provisional protection, did not prevent a second applicant from leaving a specification of a similar invention and obtaining valid letters patent for the invention before six months had elapsed from the time when the first provisional specification was left; and in such a case letters patent would not be granted to the first applicant for any part of his invention which was covered by the letters patent already obtained by the second applicant.

The last included in our list as coming within the interpretation of the term "true and first inventor," is he who

(*r*) Sec. 7, sub-sec. 5, Pat. Act, 1883.

(*s*) The Attorney-General.

(*t*) Sec. 7, sub-sec. 6, Pat. Act, 1883.

(*u*) Sec. 7, sub-sec. 5, Pat. Act, 1883.

(*v*) L. R. 4 Ch. 577.

renders practically useful an invention not previously known as part of the common knowledge of the State, or not previously practicable. It frequently happens that a man may discover a principle, but fail to apply it to a practical purpose. He, then, who practically applies the principle is the true and first inventor, for no man can claim an invention in a principle. One merely discovers the principle, and if, when he has discovered it he cannot discover a method of utilizing it so as to make it applicable to the production of a new manufacture, he cannot obtain a patent.

It has been held that a man is the "true and first inventor" within the meaning of the statute, where he patents an invention which somebody else has invented before, but not patented, provided the invention of the first inventor has been kept secret, or, without being actually kept secret, has not been made known in such a way as to become a part of the common knowledge, or of the stock of public information (*w*).

In the foregoing observations we have dealt, to some slight extent, with the construction placed upon the term "true and first inventor." We now come to the second branch of the consideration necessary to support the validity of a grant of letters patent, viz., the newness or novelty of the invention, and its utility. It is, of course, apparent that it is quite possible for a person to invent a manufacture which, although new to himself, may, so far as the world is concerned, be far from it. He may, moreover, have discovered a process not generally known, yet the knowledge of it may be such as to amount to prior user, and thus disentitle his discovery to be considered in the light of a new invention. Prior user by the inventor himself, openly and publicly, before applying for the grant, will be sufficient publication to entail this, and by such user it is not necessary that the invention should become generally known to the public, and form part of the common knowledge of the realm; for, if it is an invention connected with a particular trade, it is a public user of the

(*w*) *Plimpton v. Malcolmson*, L. R. 3 Ch. D. 555 (1876).

invention if the people of that trade are conversant with, or even know something about it ; and in such a case, inasmuch as the public is considered at law to be in full possession of the invention, it is evident that the applicant for letters patent offers insufficient consideration for the valid support of the grant, as the 6th section of the Statute of Monopolies defines a new invention as “ any manner of new manufacture which others at the time of making such letters patent shall not use.”

The use of an invention for the purposes of experiment alone, by the inventor before applying for letters patent, is not such prior user and publication as to invalidate a subsequent patent (*x*). Neither does prior public user in the colonies invalidate a subsequent patent granted here ; for it is only necessary that the invention should be new “ within the realm,” which is defined by the present Act as only including the United Kingdom and the Isle of Man (*y*). The exhibition of an invention at an Industrial or International Exhibition, certified as such by the Board of Trade, or the publication of any description of the invention during the holding of the Exhibition, or the use of the invention for the purposes of the Exhibition, does not amount to prior user or publication, and will not prejudice the right of the inventor or his legal representative to apply for and obtain protection and a patent in respect of the invention, provided that the exhibitor, before exhibiting the invention, gives the comptroller notice of his intention to, and subsequently does make application for a patent before or within six months from the date of the opening of the Exhibition (*z*).

In former days, the inclination of the judges was to construe the words “ new manufacture ” to mean actually new articles produced ; but as many of the most important inventions were discoveries in the process of manufacturing old and well-known articles, it became evident that the limitation of the words “ new manufacture ” to production

(*x*) *Bentley v. Fleming*, 1 Car. & Kir. 587 (1845).

(*y*) Sec. 16, Pat. Act, 1883.

(*z*) Sec. 39, Pat. Act, 1883.

of new articles, and to exclude processes of manufacturing old articles by cheaper and better methods, was in effect to curtail materially the inducements held out by the common law of the realm to inventors, and to work disadvantageously to the interests of the general public. Now, by the term "new manufacture," an absolutely new article of manufacture is not essentially meant, and any new process or method of manufacturing something new or old is included, so that any addition to, or subtraction from, any known machine or process, causing the old machine or process to accomplish an object in a more speedy, perfect or economical manner; or the application of an old machine, or an old material for a new purpose, is deemed a new manufacture, and may be the subject of a patent (a). But the mere application of a known instrument or machine to a new purpose will not support a patent, unless the means or method of the application is also new (b). It has, nevertheless, been held that a patent could be sustained, although each principle or process in it was previously well known, provided that the mode of combining the processes was new and produced a beneficial result. The claim for a patent in a combination, however, must be only for the particular individual improvements, not for the old parts; and this must be clearly expressed in the specification. It must also be borne in mind that, although a combination of, or an improvement on, or an addition to, an old invention is the subject of a patent itself, it cannot be used without the license of the original patentee or proprietor of the old invention, during its existence, if the old invention has to be used in the combination or with the improvement or addition; but on the expiration of the patent for such old invention the patent for the combination, or improvement or addition can be used without any license. When a license is necessary, the granting thereof is now made compulsory under the 22nd section of the Act, for, "If on the petition of any person interested it is proved to the Board of Trade that,

(a) *Muntz v. Foster*, 2 Webster's Pat. Cases, 93.

(b) *Pow v. Taunton*, 9 Jur. 1056 (1845).

by reason of the default of a patentee to grant licenses on reasonable terms, any person is prevented from working or using to the best advantage an invention of which he is possessed, the Board may order the patentee to grant licenses on such terms as to the amount of royalties, security or otherwise as the Board, having regard to the nature of the invention and the circumstances of the case, may deem just; and any such order may be enforced by mandamus." By this section it is thus rendered impossible for any person obtaining a patent in this country for some important improvement affecting an industry here, to remove such business to a foreign country and by refusing to work it in England himself, or to grant licenses to others to do so, materially injure or destroy such industry in this country.

We have now to consider the question of the utility of a patent. We have seen that, to support the grant of letters patent, not only must the invention be new, but the whole of the invention claimed in the specification must be so; yet although the latter is essential to the newness of an invention, in regard to its utility it is not so; for an invention need not in every part be useful, provided that the useless parts have not been added to the specification for the purpose of deception or of misleading the public as to the true nature of the invention.

The sixth section of the Statute of Monopolies does not refer to the necessity of the utility of inventions; but allowing as it does the common law prerogative of the Crown in respect of inventions, it refers us back to what had previously been held to be the necessary elements of an invention—something which, in consideration of the monopoly granted, should tend to the furtherance of trade, and be for the good of the realm. Consequently, that which is for the good of the realm must be useful (c).

In dealing with the question of utility, no case can be said to be an authority for another case, and in citing cases they are used rather as illustrations of what will amount to

(c) *Edgeberry v. Stephens*, 1 Webster's Pat. Cases, 35; *R. v. Arkwright*, 1 Webster's Pat. Cases, 64.

sufficient evidence than as deciding anything in principle; but such general principles as they show point to utility, meaning a substantial improvement, and not necessarily an extensive process. It will always be a question of fact, and not of law, whether an invention is useful; whether that which is set up as new is really so, and whether it is a sufficient advance upon what is already known by the public as to add materially in extent to the stock of public knowledge.

It is immaterial whether an invention be the result of long experiment or sudden or lucky thought, or mere accident; but what is material and the true test of its public utility, is that the operation or process when carried out shall improve manufacture, either by cheapening the article produced, or by improving its quality, or by improving the method of production, or the uses to which it can be put.

Although an invention may meet in all things the requirements of the 6th section of the Statute of Monopolies, there is still another condition incident to the consideration for a valid patent, and that is publication of the invention. This the law provides shall be effected by a specification, and it is the description of the invention which it contains that forms the basis upon which the patent is granted. The description given must be of such a character as to plainly indicate the nature and working of the invention, so that it may be understood and carried out without further assistance than would be brought into play by the mind of a person of ordinary capacity.

A specification is of two kinds, one "provisional," and the other "complete." In the former of these it is only obligatory to describe the nature of the invention, and it need not necessarily contain details of its working; but with regard to the second it is different, for in the "complete" specification the invention must be particularly described and ascertained. Notwithstanding there are two descriptions of specification, it is not requisite that they should both be employed, as it is competent for an applicant to file a complete specification in the first instance, the provi-

sional specification simply being a means of effecting the protection of an invention intended ultimately to be perfected.

By the present Act the law with regard to the specification is left very much in the same state as it was formerly, the changes which have been effected in connection with it being more those of practice than anything else.

The subject of the specification is indeed one which trenches closely upon the practice connected with the application for letters patent, and as points of practice are matters which it is not intended to deal with in the present article, the subject of the specification may be dismissed with the brief comments we have already made.

There is just one other observation that may be added in closing these remarks, and this is, that in the Patent Act, 1883, there is another indication of the growing opinion of the inutility of trial by jury, for in all legal proceedings connected with letters patent every case is to be tried, unless otherwise ordered, before a judge alone.

T. W. TEMPANY.

LONDON, ENGLAND.

EDITORIAL REVIEW.

The Liquor License Question.

If the McCarthy Act had come before the Judicial Committee of the Privy Council after *Russell v. Reginam*, L. R. 7 App. Ca. 829, and before *Hodge v. Reginam*, L. R. 9 App. Ca. 117, it is almost certain that it would have been held to be within the jurisdiction of the Parliament of Canada. But their lordships having committed themselves to the decision in *Hodge's* case, the matter was left even more doubtful than it was before. Either one of these cases had to be followed when the McCarthy Act came before the Committee, for they are inconsistent, notwithstanding the *dictum* to the contrary in *Hodge's* case. The holding that the Dominion Parliament cannot pass a licensing Act, instead of clearing up the inconsistency, leaves the limits of legislative jurisdiction between the Provinces and the Dominion quite as uncertain as ever they were.

The Canada Temperance Act is usually spoken of as a prohibitory Act. Assuming it to be so, the only inference to be drawn from a comparison of *Russell's* case with *Hodge's* case is that the Provinces may permit (license) liquor selling, while the Dominion may prohibit it. But if the Dominion can prohibit it at will, how can the Provinces permit or license it? And if the Provinces can license it, why should the Dominion have power to prohibit it?

But the Canada Temperance Act is not a prohibitory Act in the strict sense of the term. It is a licensing Act—

more stringent than usual—but still in principle a licensing Act. The head note to *Russell's* case states the effect of the Act as follows: it “uniformly prohibits the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, &c.” Words could not be more aptly used to describe a licensing Act. To prohibit the sale except in such way as the legislature may prescribe, is to license the sale according to the regulations laid down by the legislature, and if the Dominion might do all this once, why not again?

The Canada Temperance Act was held to be a measure designed for the “peace, order, and good government” of Canada, a measure to promote temperance—not prohibition—by means of a uniform law throughout the Dominion. If a prohibitory law, or a stringent license law, is a law for the peace, order, and good government of Canada, why is not a licensing Act less stringent, within the meaning of the same words.

What the result will be it is impossible to forecast. It is rumoured that another case will be presented to test the validity of the Canada Temperance Act. But that Act, having been once held valid, cannot now be held invalid. The Privy Council being the highest appellate Court for us is bound to follow its own decisions. The Act must therefore stand as a sort of legislative excrescence on the Dominion statute book. The only way out of the muddle is for the Imperial Parliament to enlarge the scope of article 9 of section 92, of the B. N. A. Act so as to leave the jurisdiction of the Provinces unquestionable. It is a pity that the Privy Council do not exercise more foresight in deciding upon constitutional questions, and a greater pity that they do not take broader views of the questions presented to them, instead of confining themselves to a minute and narrow point which determines but a fraction

of the whole question at issue. We have now had three cases before the Privy Council, all designed to ascertain whether the right to regulate the liquor traffic resides with the Dominion or with the Provinces. The three cases have been decided, but not the question in dispute. So it was with the law stamp question. Their lordships held the Act invalid on *one* of the grounds argued before them, and left the other point undecided. The whole question may therefore be said to be still open.

The County of York Law Association.

Some years ago, the Benchers made provision for the assistance, out of the funds of the Law Society of Upper Canada, of county bar associations throughout the Province in the formation of local law libraries to be maintained in the various county towns. This was done in recognition of the claims of the bar outside of Toronto, who, while contributing equally to the support of the large law library at Osgoode Hall, found themselves only occasionally enabled to make use of it. The proposed erection of new Court House buildings in Toronto, and the fact that no library room appeared provided for by the plans furnished, directed the attention of the profession in Toronto to the lack of library accommodation at present existing in the Court House buildings, and the need often seriously felt of books so placed as to be available for reference even in the hurry of trials at the Assizes. It was recognized that the remedy was ready at hand, requiring no more than the united action of the Toronto bar to avail themselves of it; and recently it had been generally felt that the time for such action had come. Accordingly, a meeting of the Toronto bar was held in the New Hall, on the 29th December last, for the purpose of forming a county bar association for the County of York.

Mr. B. B. Osler, Q.C., was called to the chair, and after

explanations had been made of the objects of the proposed association, it was resolved by those present to form it forthwith, and articles of association were then signed. The following gentlemen were elected trustees:—B. B. Osler, Q. C., J. K. Kerr, Q. C., W. Lount, Q. C., C. H. Ritchie, Q. C., E. Douglas Armour, G. Tate Blackstock, T. J. Robertson, Geo. F. Shepley, Walter Barwick. Mr. Osler was subsequently elected President; Mr. Kerr, Vice-President; Mr. Barwick, Treasurer; Mr. A. M. Grier, Secretary; and Mr. E. Douglas Armour, Curator.

It is proposed that some \$10,000 shall be expended in the purchase of a well selected working library to be placed for the time being in some available room in the present Court House until accommodation of a more suitable character be furnished in the new Court House buildings. While the main purpose of the Association will be to provide access to books ready at hand where the assizes sit, yet expression was also given, at the meeting, to the hope that the action taken might be the means of attaining objects other than those of a mere library association, for the general benefit of the city profession. The library when established is, of course, to be open to all members of the profession in Ontario.

The Manitoba Law Journal.

In a brief editorial note appended to the last page of the December number of the *Manitoba Law Journal* we are advised that it has ceased publication. The cause assigned is that the Law Society of Manitoba has now taken into its own hands the publication of the reports of all cases decided in that Province, thereby relieving the *Journal* of a duty the fulfilment of which was the chief cause of its publication, and of a department of work in which it was the pioneer. With this support withdrawn it could hardly be expected that the *Journal*, popular as it was, could find

a sufficient body of subscribers among a bar numbering less than one hundred members. The Manitoba Reports will now be distributed gratuitously by the Society, as in Ontario, to the bar. We congratulate the Society upon their selection of Mr. Ewart, Q.C., the able editor of the *Journal*, as reporter and editor of the reports. His name, so well known here, is a guaranty, in advance, of their excellence.

BOOK REVIEW.

Leading Cases and Opinions on International Law, collected and digested from English and foreign reports, official documents, Parliamentary papers, and other sources, with notes and excursus, containing the views of the text writers on the topics referred to, together with supplementary cases, treaties, and statutes. By PITT COBBETT, M.A., B.C.L., of Gray's Inn, Barrister-at-Law, London : Stevens and Haynes, 1885.

The comprehensive title of this book sufficiently indicates what may be found within it. The learned editor finds fault with previous writers who have written what they think ought to be the law of nations rather than what actually is the law. To avoid falling into this error the editor has printed *law* only, that is, the actual decisions of competent tribunals, following them up with notes on the points determined. The statements and judgments are condensed into a small, but not too small, space, rendering it an easy matter to get at the gist of the case.

Principles of the Common Law. An elementary work intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor, author of "Manual of Practice," "Epitomes of leading cases," "A concise treatise on bills of sale," etc., etc. Fourth edition. London : Stevens and Haynes, 1885.

Mr. Indermaur's books run through their editions so quickly that it is useless either to commend or to find fault with them. Suffice it to say that we hope this edition will disappear as rapidly as the last.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

QUEBEC.]

LEFEBVRE v. THE CORPORATION OF THE CITY OF QUEBEC.

*16 Vict. cap. 100—30 Vict. cap. 2, sec. 2—North Shore Railway Company
—Authority to use streets—Damages—Non-liability of Corporation.*

By 16 Vict. cap. 100 (Q) the North Shore Railway Company was authorized to construct a railway to connect the cities of Quebec and Montreal, with the restriction that the railway was not to be brought within the limits of the city without the permission of the corporation of the city, expressed by a by-law.

In July, 1872, the City Council, by resolution, had given to the North Shore Railway Company the liberty to choose one of the streets to the north of St. Francis street, which had been at one time chosen for that purpose. In 1874, the city council were informed by the company that the company had located the line of railway in Prince Edward street, but the corporation did not take any further action in the matter. In 1875, the company being unable to carry on its enterprise, the railway was transferred to the Province of Quebec by a notarial deed, and the transfer was ratified by 39 Vict. cap. 2 ; and by that Act the legislature was authorised to construct the road to deep water in the port of Quebec.

After the passing of this Act the Provincial Government caused the road to be completed, and it crossed part of the city of Quebec from its western boundary by passing through Prince Edward street along its entire length.

The road was completed in 1876. In 1878, L. (the appellant) owner of several houses bordering on Prince Edward street, sued the corporation of the city of Quebec for damages suffered on account of the construction and working of the railway. The corporation pleaded no liability.

Held, affirming the judgment of the Court below, that the corporation was not liable.

Appeal dismissed with costs.

Irvine, Q.C., and *Larue, Q.C.*, for the appellant.

Pelletier, Q.C., for the respondent.

RATTRAY v. YOUNG.

Quantum meruit—Cross appeal to the Court of Queen's Bench for Lower Canada (appeal side) and appeal to Supreme Court—Rights of appellants.

R. brought an action against Y. and others (the heirs of Y.) for services rendered and work done in administering and managing for several years "The estate Y." The defendants pleaded that the plaintiff had been engaged at and paid \$400 per annum. At the trial it was proved *inter alia* that the executors of Y. had employed R. and agreed to pay him what was "fair and right;" that R. had credited himself in the books of the estate with only the sum of \$400 per annum, and had distributed portions of the estate after so crediting himself with that sum; that after R. had ceased to be employed, Y. and others (respondents) had to pay \$1,000 per annum each to two persons to do less work than R. had been doing. The Judge who tried the case awarded R. the sum of \$1755.54.

Thereupon Y. appealed to the Court of Queen's Bench (appeal side), and R. filed a cross appeal. That Court dismissed R's cross appeal and allowed Y's appeal. R. appealed to the Supreme Court of Canada, and it was

Held, Gwynne, J., dissenting, that the judgment of the Court of Queen's Bench should be reversed, and the judgment of the Court of first instance modified by increasing the amount to \$2399, on the ground that it was according to the evidence a "fair and right" remuneration for the services rendered.

Appeal allowed with costs.

Irvine, Q.C., and *G. Stuart*, for the appellant.

Languedoc, for the respondent.

NOVA SCOTIA.]

EUREKA WOOLEN MILLS CO. v. MOSS.

Appeal—New trial ordered by the Court below—Verdict against weight of evidence.

The Supreme Court of Canada will not hear an appeal where the Court below, in the exercise of its discretion, has ordered a new trial, on the ground that the verdict is against the weight of evidence.

McIntyre, for the appellants.

Dunlop, for the respondents.

HOWARD v. THE LANCASHIRE INS. CO.

Appeal—New trial ordered by the Court below—Questions of law—Insurance Policy—Insurable interest—Special conditions—Renewal—New contract.

J., manager of the appellant's firm, insured the stock of one S., a debtor of the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance, J. represented the appellant to be mortgagee of the stock of S. S. became insolvent, and J. was appointed creditors' assignee, and the property of the insolvent was conveyed to him by the official assignee.

On 8th March, 1876, S. made a bill of sale of his stock to J., having previously effected a composition with his creditors under the Insolvent Act, 1875, but not having had the same confirmed by the Court.

The insurance policy was renewed on 5th August, 1876, one year after its issue. On 12th January, 1877, the bill of sale to J. was discharged, and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent; and that the execution of the latter was merely carrying out the original intention of the parties.

The stock was destroyed by fire on 8th March, 1877, and an action having been brought on the policy, it was tried before a judge without a jury, and a verdict was given for the plaintiff.

The Supreme Court of Nova Scotia set aside this verdict and ordered a new trial, on the ground that the plaintiff had no insurable interest in the property when the insurance was effected, and that no subsequently acquired interest would entitle him to maintain the action.

One of the conditions of the policy was "that all insurances, whether original or renewed, shall be considered as made under the original representations, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make when the risk has been changed either within itself or by the surrounding and adjacent buildings."

On appeal to the Supreme Court of Canada,

Held, (i) that the case did not come within the rule laid down in *Eureka Woolen Mills Company v. Moss* (ante p. 26), and was one properly appealable.

(ii) That the appellant having no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of an existing policy being merely a continuance of the original contract.

Gormully, for the appellant.

Tremaine, for the respondents.

NEW BRUNSWICK.]

FAWCETT v. ANDERSON.

*Contract—Novation—Sale of land—Delivery of deed for inspection—
Receipt for—Action on.*

Land was sold at auction by A. (the plaintiff) under power of sale in a mortgage to W., and one F. (the defendant) became the purchaser, the terms of sale being ten per cent. cash, and balance in one and two years, with interest, secured by joint notes of the defendant and some other responsible person. The defendant paid the ten per cent., and a conveyance was prepared and executed by W. in favour of the defendant, and was given to the plaintiff for the purpose of having the sale completed. The plaintiff took the deed to the defendant, who said that he wished to show it to his attorney; but the plaintiff objecting to part with the deed without something to show that the purchase money had not been paid, the defendant signed and gave to the plaintiff a receipt as follows:—
“Received from E. A. a deed given by W. for a piece of land bought, etc. The above-mentioned deed I receive only to be examined, and if lawfully and properly executed, to be kept: if not lawfully and properly executed, to be returned to E. A. When the deed is lawfully and properly executed to the satisfaction of my attorney, I will pay the amount of balance due on said deed, provided I am given a good warranty deed, and the mortgage which is on record is properly cancelled if required.” In an action brought by the plaintiff on this agreement, a verdict was given for the plaintiff for \$572, and interest, but the jury found, in answer to a question left to them, that the writing signed by the defendant on the 2nd October was not a new agreement for the payment of the purchase money of the land.

This verdict was subsequently set aside by the Supreme Court of New Brunswick and a new trial ordered. The case having come on for trial again in January, 1884, a verdict was found for the defendant, the present appellant. The plaintiff, the present respondent, afterwards moved to

set aside the verdict, and for a new trial on various grounds, or for a verdict to be entered for him, under leave reserved, for nominal damages (the purchase money having been paid to W. after this suit was brought), which a majority of the Court ordered, and against which order an appeal was taken to this Court, where it was

Held, reversing the judgment of the Court below, Strong, J., dissenting, that there was no new contract created between the appellant and the respondent, and the action against the appellant was not maintainable.

Hannington, Q.C., for the appellant.

Blair, for the respondent.

TOWN OF PORTLAND v. GRIFFITHS.

Negligence—Defective sidewalks—Damages—Liability of corporation—Contributory negligence.

The declaration by the first count alleged that the defendants had the care of public streets of the Town of Portland; that it was their duty to keep them in a safe and proper condition for citizens passing to and fro; that there was a street in such town under such care and subject to such duty, known as Main street; and that the plaintiff was walking and passing over the said street, when, by reason of the negligence and improper conduct of the defendants in not keeping the same in repair, etc., the plaintiff was injured. The second count set out that the plaintiff travelling upon said street and using due care, was injured. The third count set out that the defendants negligently allowed a hole to remain in the said street, and that the plaintiff, while lawfully using the street, and without negligence on her part, was hurt.

The evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the windows of her dwelling from the outside of the house, and that, in taking a step backward, her foot went into a hole in the sidewalk and she was thrown down and hurt. She also swore that she knew the hole was there. The jury awarded her \$300 damages, and the Supreme Court of New Brunswick refused to set aside the verdict.

Held, Henry, J., dissenting, that the plaintiff was neither walking and passing over, travelling upon, or lawfully using the said street, as alleged in the declaration, and that the verdict must be set aside.

Held, also, that the accident, if occasioned by the defective sidewalk, was due to the plaintiff's own negligence.

Appeal allowed with costs.

Stockton, for the appellant.

Skinner Q.C., for the respondent.

CHAPMAN v. RAND.

Canada Temperance Act, 1878—"Scrutiny"—Powers of County Judge.

Held, Henry, J., *dubitante*, that a Judge of the County Court, on holding a scrutiny of votes under the provisions of the "Canada Temperance Act, 1878," can only determine which side has a majority of the votes polled, by inspection of the ballots, and has no power to inquire into corrupt acts, such as bribery, etc., which might avoid the election.

Blair, for the appellant.

R. B. Smith, for the respondent.

TAYLOR v. MORAN.

Marine Insurance—Voyage Policy—Sailing restrictions—Time of entering Gulf of St. Lawrence—Attempt to enter—Amendment of pleadings.

In an action on a voyage policy containing this clause: "Warranted not to enter, or attempt to enter, or to use the Gulf of St. Lawrence prior to the tenth day of May nor after the thirtieth day of October, (a line drawn from Cape North to Cape Ray and across the Strait of Canso to the northern entrance thereof shall be considered the bounds of the Gulf of St. Lawrence seaward)," the captain testified:—"The voyage was from Liverpool to Quebec, and the ship sailed on 2nd April. Nothing happened until we met with ice to the southward of Newfoundland. We shortened sail and dodged about for a few days, trying to work our way around it. One night the ship was hove to under lower main topsail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours. Laid to all the next day. Could not get further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log-book showed that the ship got into this ice on the 7th May, and an expert examined at the trial swore that, from the entries in the log-book of the 6th, 7th, 8th and 9th May, the captain was attempting to enter the Gulf of St. Lawrence.

A verdict was taken for the plaintiffs by consent, with leave for the defendants to move to enter a non-suit, or for a new trial, the Court below to have the power to mould the verdict, and also to draw inferences of fact as a jury.

Held, reversing the judgment of the Court below, reported ante p. 430, Henry, J., dissenting, that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the Gulf contrary to the aforesaid clause.

Appeal allowed with costs.

Weldon, Q.C., for the appellant.

Stockton, for the respondent.

ONTARIO.

High Court of Justice.

COMMON PLEAS DIVISION.

[DIVISIONAL COURT, 19TH DECEMBER, 1885.]

CANADIAN PACIFIC RAILWAY CO. v. GRANT.

Claim and counter-claim—Cross judgments—Set-off—Solicitors' lien.

The plaintiffs sued for freight for the carriage of timber, and the defendant counter-claimed for damages for neglect and delay in the carriage of the timber.

The judgment at the trial was as follows:—"The verdict will be for the plaintiffs for \$2,122; and for the defendant upon his counter-claim for \$1,420; and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions; and I direct that judgment be entered accordingly."

Held, reversing the decision of the Master in Chambers, that the judgments recovered by the plaintiffs and defendant must be treated as judgments in separate actions; and therefore that in setting off the judgments the lien of the defendant's solicitors upon the judgment against the plaintiffs for costs should be protected.

Watson, for the plaintiffs.

Wallace Nesbitt, for the defendant.

[2ND JANUARY, 1886.]

CONMEE *et al.* v. THE CANADIAN PACIFIC RAILWAY CO. (No. 2).

Causes of action—Consolidation.

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a railway construction contract, and in this action, which was begun more than a month after the first, they claimed from the same defendants a sum of \$3,000, the amount of a

store account for goods sold and delivered. The cause of action herein arose before the commencement of the first action.

Held, that the two claims should have been joined in one action, and that it was a proper exercise of discretion to consolidate this with the former action, so that the two might be tried together, and the same defences made available in both.

Osler, Q.C., for the plaintiffs.

Moss, Q.C., for the defendants.

THE SARNIA AGRICULTURAL CO. v. PERDUE.

Changing venue—Judge in Chambers—Judge holding Assizes—Divisional Court—Convenience—Costs.

Mr. Winchester, sitting for the Master in Chambers, refused the defendants' application to change the venue from Sarnia to Stratford, but gave leave to bring on an appeal from his order or a substantive motion to change the venue before Armour, J., at the Sarnia Assizes.

Armour, J., entertained the motion, which was made according to the leave given, and made the order changing the venue to Stratford. The order was drawn up as made by a judge at the assizes, and was signed by the local Registrar at Sarnia.

Held, that, having regard to Rule 254, and to the leave given, and the character of the motion, the order of Armour, J., was to be regarded as that of a judge and not of the High Court, and could therefore be reviewed by the Divisional Court.

There is nothing to prevent a judge at the assizes hearing a motion which in the ordinary course would be heard at his Chambers in Osgoode Hall, if he is disposed for the purpose to treat the Court room as his Chambers.

Such application, however, should not be made at the trial on account of the inconvenience and loss to the public from the delay of other business appropriate to the assizes, and on account of injustice to parties to the cause who have prepared for trial, in having the venue changed at this stage; and it is too late, when the assizes have begun, to consider the balance of convenience; and, therefore, while the Court did not see fit, under the circumstances, to restore the venue to Sarnia, they ordered that the costs of the day at Sarnia, and of the several motions to change the venue, as well as of the present appeal should be costs to the plaintiff in the cause in any event.

W. H. P. Clement, for the appeal.

Aylesworth, contra.

CHANCERY DIVISION.

[PROUDFOOT, J., 11TH NOVEMBER, 1885.]

CLARKE v. UNION FIRE INS. CO.—SHOOLBRED'S PETITION.

Company—Winding up—45 Vict. cap. 23 (D)—47 Vict. cap. 39 (D).

There is nothing in 47 Vict. cap. 39, s. 2, to limit its application to companies being wound up at the date of 45 Vict. cap. 238 (17th May, 1882). It applies to a company in liquidation, or in process of being wound up. Liquidation would apply to a company insolvent, though not technically being wound up, and against which proceedings are being taken to realize its assets and pay its debts.

Notice need be given to the company only, as was done in this case, and perhaps also to creditors who have brought actions against the company, and whose actions would be stayed by the winding up order.

It is not correct to say that there is no power to refer the appointment of a liquidator under these Acts to the Master.

Foster, Q.C., for the liquidator.

W. H. Walker, for the petitioner.

IN CHAMBERS.

[BOYD, C., 23RD DECEMBER, 1885.]

BOULTON v. BLAKE.

Extraordinary discovery—Rule 285, O. J. A.—Discretion of Court—Information for purpose of pleading.

The right of extraordinary discovery must be jealously guarded, lest it be abused; and it should, under Rule 285, O. J. A., be conceded only when it is clearly proved to be necessary for the furtherance of justice. An application to examine under Rule 285 is in the discretion of the Court, and that discretion was not wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering defence, in order to obtain, for the purpose of pleading, a knowledge of material facts, not otherwise to be had by the defendant.

Walter Barwick, for the plaintiff.

Small, for the defendant.

Re ENGLISH.

Settled Estates Act—Separate examination of married woman—Married Women's Property Act, 1884.

In a petition under the Settled Estates Act, the separate examination required by the Act of a married woman living out of the jurisdiction, was dispensed with, in order to avoid delay and save expense; but not the examination of married women within the jurisdiction, where no special circumstances existed. The Married Women's Property Act, 1884 (O), does not apply to cases under the Settled Estates Act, where the woman had acquired the property before the former Act came into force.

William Roaf, for the petitioner.

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SCHRAGG v. SCHRAGG.

Solicitor—Costs—Retaining money—Payment—Delivery of Bill—Stipulation.

Solicitors retained out of moneys in their hands belonging to their client sufficient to pay their costs of the action, and handed to the client a cheque for the balance. The client accepted the cheque, but did not cash it till she had written to the solicitors stipulating that the cashing should not be taken as a waiver of her right to recover a larger sum if she could show that more was due her.

After a lapse of a year from this transaction, the client applied for an order for delivery of a bill of costs.

Held, that the circumstances did not constitute payment of the costs, and the order for delivery was made.

Re Sutton, 11 Q. B. D. 377, distinguished.

Holman, for the solicitors.

Aylesworth, for the client.

STANDARD INS. CO. v. HUGHES.

Interpleader—Claimants—Attaching creditors—Appeal.

Held, following *Leech v. Williamson*, 10 P. R. 226, that attaching creditors are such claimants as are embraced in the provisions of the Interpleader Act, and a sheriff is entitled to apply under the Act for relief in respect of a claim made by such creditors upon moneys in his hands, the proceeds of a sale under execution.

Although *Macfie v. Pearson*, 8 Ont. R. 745 ; 5 C. T. L. 137 ; in effect decides that the execution creditor who has seized before the issue of process against the defendant as an absconding debtor is to be paid in priority, yet that decision, having been rendered by consent in a summary way, is not binding upon the claimants, who may choose to litigate upon issues which can be carried to appeal.

Holman, for the sheriff.

Wm. Seton Gordon, and *Aylesworth*, for the attaching creditors.

Masten, for the execution creditors.

W. H. P. Clement, for the certificated creditors.

[ROSE, J., 22ND DECEMBER, 1885.]

McNABB v. OPPENHEIMER.

Rescinding order for ca. sa.—Jurisdiction of judge who made the order—Discharging defendant.

A Judge in Chambers has no power to rescind his own order for a writ of *ca. sa.*, or to discharge the defendant from custody, after the order has been acted upon.

Masten, for the plaintiff.

T. C. Milligan, for the defendant.

In the Maritime Court.

(Reported by R. Gregory Cox, Esquire, Barrister-in-law.)

THE "SIR C. T. VAN STRAUBENZIE."

Salvage agreement—Implied condition in fall contracts as to time of performance—Evidence of custom—Lex loci contractus—Contract made in foreign country to be performed in Ontario.

A vessel was aground on the north shore of Lake Superior in the month of November. The insurers in Buffalo accepted an offer made by the salvors at Port Arthur to take the vessel off for a certain sum "or no pay." The contract was wholly by telegrams between the parties, and no time was mentioned within which the job was to be done. Evidence was given to show a custom or implied condition that the job should be finished in the fall.

Held, that there is no such condition implied in such a contract, and that the evidence failed to prove the existence of any custom or usage by which such a condition is annexed to the written contract.

Held, also, that the law governing salvage agreements made by masters of vessels has no application to a contract made by the owners of the vessel with full knowledge of the facts.

This was a case of salvage instituted by Graham, Horne & Co., vessel owners, of Port Arthur, against the schooner *Sir C. T. Van Straubenzie*, to recover \$3,500, alleged to be due under a contract with the underwriters for taking the vessel off the shore near Point Porphyry on Lake Superior, and towing her to Port Arthur. The Thames and Mersey Marine Insurance Company, and the Union Insurance Company (both American Companies), which had insured the vessel in the respective sums of \$5,000 and \$3,000, intervened, and by their answers admitted that they entered into an agreement with the plaintiffs to pay them the sum claimed if they should save the vessel, but they alleged that the plaintiffs agreed to proceed forthwith to get the vessel off, and tow her to a safe place before the winter set in, and that it was on this express understanding that the defendants agreed to pay the sum claimed, which was an unusual and excessive amount, and the plaintiffs were not to be paid anything unless the work was performed before the winter. They further alleged that the plaintiffs failed to take the vessel off the shore in the fall, and that the defendants arranged with other parties to do the work in the spring for \$1,000; that these parties made all the necessary preparations to take the vessel off and tow her into port, when the plaintiffs without authority interfered and removed the vessel. The defendants further alleged that they had been compelled to pay the parties referred to the said sum of \$1,000.

The vessel was arrested and released on bail.

The case was tried at St. Catharines on the 3rd and 8th December, 1884, before E. J. Senkler, Esq., Surrogate Judge.

The facts as found by the learned judge were as follows:—In November, 1883, the *Sir C. T. Van Straubenzie*, while being towed by the steam barge *Lothair* on Lake Superior, was cast loose in consequence of rough weather, and went ashore on the north shore of the lake. The crew and cargo were taken by tugs to Point Porphyry Light House, and attempts were made to get the vessel off by these tugs, but without success; and she was left on the shore, and notice of abandonment given to the Insurance Companies, or their agents at Buffalo, Messrs. Crosby & Dimick.

The vessel was on shore near Point Porphyry, and about nine miles from Silver Islet. The plaintiffs, who are vessel owners and dealers in lumber, carry on business at Port Arthur and Fort William. They heard of the stranding of the *Straubenzie* in November, shortly after it happened, and having found out that Crosby & Dimick were interested, telegraphed them to ascertain whether they wanted the plaintiffs to make an offer. They received a reply by telegram, and then wrote a letter dated 4th December, 1883, stating that having sold their boats, they were unable to make any offer. On the 5th or 6th December, however, they purchased the tug *Salty Jack* from a firm at Port Arthur, and on the 6th December sent the telegram of that date to Crosby & Dimick, Buffalo.

It reads as follows:—"We will deliver *Straubenzie* at Port Arthur for thirty-five hundred dollars or no pay, tugs now here, weather good, must have answer at once. (Signed) Graham, Horne & Co." Messrs. Crosby & Dimick received this telegram, and on the 8th December, 1883, replied as follows:—"We accept your proposition for release of *Straubenzie*, thirty-five hundred dollars or no pay. (Signed) Crosby & Dimick."

This was received by the plaintiffs on either the 8th or 9th December, 1883, and on the 10th December (Monday), the plaintiffs John C. Graham and John T. Horne started with the *Salty Jack* from Port Arthur to go to the wreck. They left Port Arthur shortly after 11 a.m., and got to Silver Islet about 5 p.m. The weather that day was cold and clear, and they intended going to the wreck the next morning, but it turned to bad weather, and they could not leave Silver Islet until the 14th December. They attempted to leave on the 13th, but were driven back. On the 14th the weather was good, and they went to where the vessel was stranded, about nine miles from Silver Islet. They found the vessel ashore in a little bay, on a rock. On one side she was ashore about 75 feet, and on the other about 50 feet. She had gone ashore stern first, and her bow was pointing out to the lake. There was about 5 feet of water at the bow, and only 15 inches at the stern, on the rock. There was a line leading from the bow on the rock side to the shore, that is, to each point of the little bay in which the vessel lay. Her anchors were out in the lake. The chains were attached to the vessel, but slack. The crew of the *Salty Jack* went to work to release the vessel. They loosened the lines leading to the shore, and let off the anchor chains and buoyed them, as they were in their way when working. They worked all that day, but did not get the vessel off. About 5 p.m. they were driven from the vessel by

bad weather. It turned very cold and blew, with flurries of snow. The *Salty Jack* was taken to a fishing channel near by, where she got aground.

It was so cold that night that the spirit in the glass froze; next morning the *Salty Jack* was got off from where she was aground, and went back to the *Straubenzie*, but the ice had been driven in by the wind so that they could not work, and were in danger of being blocked in by the ice for all winter; and they therefore abandoned further attempts at that time.

The *Straubenzie* had been turned round during the work done on the 14th, so that her stern was out toward the lake, which was considered by the plaintiffs a better position for her, that is, safer to winter in.

The plaintiffs left their own lines on the *Straubenzie*, housed as well as they could manage. The lines of the *Straubenzie*, which had been carried from the vessel to the shore and fastened, were frozen so stiff when plaintiffs first got to the wreck that nothing could be done with them, and they were left loose. The plaintiffs went to Silver Islet, stopped there an hour, and then went on to Port Arthur, which place they reached on the 15th December.

Not much, if anything, was accomplished by the plaintiffs on this occasion in the way of getting the *Straubenzie* off. John C. Graham said that he thought they moved the vessel somewhat towards deep water, but would not swear to it. The way things looked, however, they felt confident they would get her off with the *Salty Jack* alone. Before the *Salty Jack* had left Port Arthur for the wreck on the 10th December, the plaintiffs had made arrangements with the owners of two vessels there, the *Georgian* and the *Kincardine* (both being steam barges), to come to their assistance if required. It was not shown clearly when that arrangement was made. It was apparently made on the 6th December, when the telegram was sent to Crosby & Dimick containing plaintiffs' proposal. The *Georgian* left Port Arthur on the 16th December, with a cargo for Peninsular Harbour, which is about 120 miles east of Port Arthur. The arrangement was that on her way back she was to come close to Point Porphyry and Silver Islet, and the *Salty Jack* could whistle for her if she was wanted.

No arrangement was made as to her remuneration; that was left an open question, although the owners of the *Georgian* knew what plaintiffs' bargain was—that is all they could have known on the 6th December.

The *Kincardine* was at Port Arthur on the 5th December; she was going to Michipicoten with a cargo; no bargain was made as to her remuneration either.

In the ordinary course, with reasonably good weather, the *Georgian* should have been at Point Porphyry on her way back to Port Arthur on the 11th or 12th December; but owing to the bad weather, she did not get back to Port Arthur until the 17th or 18th, and consequently did not pass Point Porphyry until the 16th or 17th, which was after the *Salty Jack* had left the wreck.

It was not stated when the *Kincardine* was expected, but as a matter of fact she did not go near Point Porphyry, having been sunk in a bay called Jack Fish Bay.

Thus the agreements made with these vessels proved futile. When the *Salty Jack* was at Silver Islet on the 12th December, a tug called the *Vinton* was there. On the 14th (the day the *Salty Jack* went to the wreck), the *Vinton* could not be got, but arrangements were made to get her the next day if the plaintiffs required her. The next day, however, nothing could be done, as already stated, and the owners of the *Vinton* were told she was not wanted.

The arrangements with the *Vinton* seemed to have been carried further than those with the *Georgian* and *Kincardine*, as the price to be paid, \$600, was offered and discussed, if not accepted. On the same day that the *Salty Jack* returned to Port Arthur, the 15th December, the plaintiffs wrote a letter to Crosby & Dimick; the letter was in the following words:—“ We sent an expedition to the *Straubenzie* Monday; they returned to-day without the vessel. The weather turned very cold, and we have concluded that nothing more can be done toward her release this fall. We have hopes that she will winter all right. The writer will be in Buffalo very soon, and will be able to give you any particulars you may wish to know about the vessel. Yours truly, (Signed)

Graham, Horne & Co'y., per Graham.

In January, 1884, John C. Graham and George A. Graham went to Buffalo and called at the office of Crosby & Dimick. Neither of the firm were in, but they saw the clerk in charge. George A. Graham was not called as a witness, but John C. Graham was, and gave his statement of what occurred. He said they explained to the clerk how the vessel lay, and told him that if Mr. Crosby on his return wanted any further information, he was to wire them at St. Catharines, and they would go over and explain matters to him. Although John C. Graham remained in St. Catharines until the 1st of May, 1884, he heard nothing from Crosby & Dimick, nor did he send them any messages.

On cross-examination, John C. Graham denied asking the clerk of Crosby & Dimick what they intended doing with the vessel, or the clerk saying that they intended letting her lie until spring. He also denied saying that he would take a contract to take the vessel off in the spring, or giving him to understand that they had abandoned the vessel, and that the contract was off, or that they had been to the vessel and had not the facilities for getting her off. He said that he did tell the clerk that they would be able to get her off in the spring.

Louis P. Nickerson, the clerk of Crosby & Dimick, was called for the defence, and said he remembered a member of the plaintiffs' firm calling at Crosby & Dimick's office in January. He thought it was John C. Graham. He came to tell how the vessel lay, and the facts connected with the wreck. He said that she lay in an easy position, that he had been to the vessel, and the firm was unable to release her; that he was about buying vessel property in Canada, and if he did so, as he lived handy to where the vessel was stranded, he would be able to get the vessel off in the spring. Nickerson said he would give his communication to Mr. Crosby when he came back. Nickerson did not recollect distinctly that Mr. Graham asked the question what the company expected to do with

the vessel in the spring, but he thought he did so. Nickerson said "Graham intimated to me, as near as I can remember, that he would like to get the contract in the spring. He did not put forth any claim to having a contract to remove the vessel in the spring; he did not do so at any time." Nickerson communicated what Graham had said to Mr. Dimick.

On cross-examination, he said that he gathered from Graham's saying that he expected to get vessel property, that he would like the contract in the spring.

In January or February, 1884, the plaintiffs purchased the propeller *Prussia* at St. Catharines, and on or about 1st May, she started for Port Arthur, which place she reached on the 13th, or morning of the 14th, and on the afternoon of the 14th, the *Prussia* and *Salty Jack* started for the *Straubenzie*, which was found in exactly the same position as she had been left by the *Salty Jack* in December previously. On the 15th May both vessels were set to work to get the *Straubenzie* off, which was accomplished, and she was taken to Port Arthur the same evening.

When working at the *Straubenzie* in December with the *Salty Jack* alone, the mode of working was to fasten a line to the bow of the *Straubenzie* and turn her round, and then fasten it to the stern, and turn her round the other way, endeavouring to work her off in that way; but the vessel being on a rock described as like a whale's back, and turning as it were on a pivot, little progress was made. In May, they tried a direct pull with both *Prussia* and *Salty Jack*, but, after breaking their line four or five times, abandoned this mode and worked her as in the fall; and fastening lines from the two vessels to different parts of the *Straubenzie*, and getting what they called a lifting pull, got her off.

On the 16th May, the plaintiffs wrote to Crosby & Dimick, Buffalo, a letter advising them of the release of the *Straubenzie*, and enclosed in this an account claiming the \$3,500. The firm of Crosby & Dimick had been dissolved in December, 1883, and the firm of Crosby & Gunning formed, and the latter firm early in January became the agents of defendants, instead of the former firm, and plaintiffs' letter of the 16th May was received by the Receiver of Crosby & Dimick, and handed to Mr. Gunning on the 24th May. Mr. Gunning had heard of the release of the *Straubenzie* as early as the 19th May; he thought he received a telegram from the plaintiffs advising him of the fact; and on the 19th May, Crosby & Gunning telegraphed plaintiffs as follows:—"Advised Miller, at Parry Sound, to send his captain at once to take charge and bring his vessel down."

Gunning stated that he next heard from the persons with whom he was making arrangements to tow the vessel to Port Huron that the plaintiffs would not let the vessel go until they were paid; whereupon he, on the 29th May, telegraphed plaintiffs as follows:—"Have arranged with Hall to tow *Straubenzie* to Port Huron; please deliver vessel and send your bill, which we will promptly settle. (Signed) Crosby & Gunning."

On 21st May, Crosby & Gunning wrote a letter to plaintiffs, acknowledging receipt of a telegram from them stating "our bill for wrecking is \$3,500 as per contract; please instruct us to make sight draft for same;"

and asking what the contract was, and for copy of same, and on the 24th May they wrote again, after receiving the plaintiffs' letter of the 16th.

In both of these letters they stated that they had made a contract, before hearing of the release of the *Straubenzie* by the plaintiffs, with S. A. Murphy, of Detroit, to release her and deliver her at Port Huron for \$1,000; and in their last letter, after refusing to recognize the plaintiffs' bill, and referring to a threat of the plaintiff Horne to libel and hold the vessel, and saying that if that was plaintiffs' intention, they would have to arrange to bond the vessel and stand suit, they add, "we do not think this advisable for either party, as if you have flat contract made last fall and extended until spring, any Court of equity will give you any excess of that which other responsible wrecking company contracted to do the work for."

At the trial, evidence was given by the defendants of a contract with Murphy, made in the spring of 1884, to release the vessel and take her to Port Huron for \$1,000, and also of an alleged general custom or understanding in all contracts made in the fall of the year for the salvage of vessels, that they must be performed in the fall, and did not extend to the following spring. This evidence is referred to more particularly in the judgment.

R. Gregory Cox, for the plaintiffs, cited *Taylor on Evidence*, p. 1033; the *Silesia*, L. R. 5 P. D. 177; the *Waverley*, L. R. 3 A. & E. 367; the *Medina*, L. R. 1 P. D. 272, and L. R. 2 P. D. 5; the *Catherine*, 12 Jur. 685; and the *Catherine*, 6 Notes of Cases, Suppl. XLIII; the *Mulgrave*, 2 Hagg.; the *True Blue*, 2 W. Rob. 176; and 7 Jur. 756; the *Fire Fly*, Swa. 240; the *Helen & George*, Swa. 368; the *Resultutes*, 17 Jur. 353; the *Theodore*, Swa. 351; the *Graces*, 2 W. Rob. 294.

J. C. Rykert, Q.C., for the defendants, cited *Clever Keekman*, 33 L. T. N. S. 672; *MacLachlan on Shipping*, Ch. 13; the *James Armstrong*, L. R. 4 P. D. 380; *Silesia*, L. R. 5 P. D. 177; the *City of Chester*, L. R. 9 P. D. 201; the *Otto Herman*, 33 L. J. Ad. 189; the *British Empire*, 6 Jur. 608; *Cairns v. Smith*, 15 M. & W. 189; *Mount v. Larkin*, 8 Bing. 108; *Clipsam v. Virtue*, 5 Q. B. 265; *Culten v. Purcell*, 2 Smith's L. C. 18; the *Amerique*, L. R. 6 P. C. 468; the *Artees*, 21 L. T. N. S. 797; the *Nellie*, 29 L. T. N. S. 516.

SENKLER, Sur. J., 2ND APRIL, 1885.—The evidence of the agreements between the plaintiffs and Crosby & Dimick, is contained in the telegram of the plaintiffs of the 6th December, 1883, and Crosby & Dimick's telegram in reply of the 8th December. Plaintiffs' telegram is as follows:—"We will deliver at Port Arthur for twenty-five hundred dollars or no pay; tugs now here; weather good; must have answer at once." The answer of Crosby & Dimick is:—"We accept your proposition for release of the schooner *Straubenzie*, thirty-five hundred dollars or no pay."

There is nothing in the earlier telegram so far as is shown in the evidence, or in the plaintiff's letter of 4th December, to affect the contract or throw any light upon it.

The allegation of the defendants in their answer that it was upon the express agreement that the plaintiffs should proceed forthwith to get the vessel off the shore, and tow her to a safe harbour before the winter fully set in, and that the plaintiffs were not to be entitled to any portion of the

said money, if the said services were not performed before the winter as agreed, is not sustained by the language of the telegrams of the 6th or 8th December. No doubt the plaintiffs' telegram clearly indicates their intention to proceed with the adventure at once, and that time was of importance, but it does not in express terms say that the adventure was to be finished before winter set in, nor do Crosby & Dimick, in their telegram of acceptance, refer to such stipulation. The defendants, however, contend that although it may not be so expressly stated, the contract was really what they call a time contract, *i.e.*, that it was to be completed before the setting in of winter; and they urge that the surrounding circumstances, the large price proposed to be paid, the conduct of the plaintiffs in making arrangements to procure the assistance of other vessels, and the language used by them in their telegram, urging the necessity of speedy reply, all show that this was the intention and understanding on both sides. They also contend that this is the usage of trade in those contracts, and call witnesses to prove this; and they also say that at all events the work was to be done within a reasonable time, and that the plaintiffs, owing to their not having the proper appliances, did not release the vessel within a reasonable time.

If they had had the vessels and other proper appliances when they made the attempt on the 14th December, they would have succeeded on that day, and the vessel would not have been left exposed to the dangers of the winter, her escape from which was the result of good fortune and not of the plaintiffs' exertions, and that if the plaintiffs now recover the large sum of \$3,500, which was really offered to prevent the exposure of the vessel to these dangers, they will be paid for services never really rendered by them; and lastly, they contend that if the contract is not as they urge it is, it ought not to be enforced, as it is not a fair and reasonable one, and all salvage contracts must be shown to be just and reasonable before they will be enforced by the Court. The plaintiffs, on the other hand, contend that they have done all that they contracted to do in releasing the vessel and having her ready to deliver at Port Arthur. They deny that the contract was a time contract, or subject to any stipulation that it must be performed before the winter set in, or that there is any usage of trade to that effect. They deny that they were guilty of any negligence or remissness, but assert that they acted with all reasonable promptness, and did all that could be done to get the vessel off in the fall, but were prevented by the weather; and, lastly, they deny that the alleged rule of the Maritime Court as to salvage agreements has any application to the present case. It will be most convenient to consider first the evidence of the alleged usage of trade or custom requiring the performance of the contract before the setting in of winter and to ascertain the effect it has.

[The learned judge then proceeded to comment upon the testimony of certain witnesses.]

In commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been

established and prevailed, and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to these known usages: *Hutton v. Warren* (a).

There are certain incidents annexed to various kinds of contracts by the common law, and of these the Courts take judicial notice, but incidents annexed by the usage of trade require to be proved: *Gibson v. Small* (b). Where, however, a usage of trade has been repeatedly proved in Courts of law, the Courts will afterwards take judicial notice of it without proof, and such usage will perhaps then be considered as part of the common law, or law merchant: *Goodwin v. Roberts* (c); *ex parte Powell* (d). In the present case, I have not been referred to any authority showing that the custom now set up is one of the incidents which are annexed by the common law, nor to any case in which it has been proved and established. It must therefore depend on the evidence given in the present case. The character and description of evidence admissible for the purpose of annexing a term to a mercantile contract is the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witness who may be called to speak to it, for a contract may be safely and correctly interpreted by reference to the fact of usage, as it may be presumed such fact was known to the contracting parties, and that they contracted in conformity thereto: *Lewis v. Marshall* (e). It was said by Lord Cranworth in *Mackenzie v. Dunlop* (f), in considering the admissibility of certain evidence, that "a usage of trade is only to be proved by a multiplication of custom." In *Ghose v. Manick Church* (g), it is said, with reference to the evidence required to support a usage, "there needs not either the antiquity, the uniformity, or the notoriety of custom which, in respect of all those, becomes a local law. The usage may be still in course of growth; it may require evidence for its support in such case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."

A usage must be shown to be certain and reasonable, and so universally acquiesced in that everybody in the particular trade knows it, or might know it, if he took the pains to enquire: *Plance v. Allcock* (h). As to the question how far it is necessary that a party sought to be affected by a usage of a trade or market must be cognizant of the usage, it is clear that when a person employs a broker to transact business for him upon a market with the usages of which the principal is unacquainted, he gives

(a) 1 M. & W. p. 475.

(b) 4 H. L. C. p. 397.

(c) L. R. 10 Ex. 346.

(d) L. R. 1 Ch. D. 506.

(e) M. & G. p. 744.

(f) 3 H. L. C. 22; 2 Jur. N. S. 875.

(g) 7 Moo. Ind. App. 282.

(h) 4 F. & F. 1074.

authority to the broker to make contracts upon the footing of such usage, provided they are such as regulate the mode of performing the contract, and do not change its intrinsic character : *Robinson v. Mollett* (i). And so if a merchant residing at London employs an agent at Liverpool to make a contract for him at Liverpool, the contract so made will be clothed with all the incidents of a Liverpool contract : *Graves v. Legg* (j).

These seem to be largely questions of agency, but it has been said that "a person who deals in a particular market must be taken to deal according to the custom of that market ;" per Alderson, B., in *Baycliffe v. Butterworth* (k). In *Robinson v. Mollett*, already referred to, Beck, J., said, "a stranger to a locality, trade or market, is not held to be bound by the custom of such locality, trade or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade or market, wherein all who are not strangers do know or act upon such custom ;" and it is suggested by the editors of *Smith's Leading Cases*, 8th ed., at page 616, that the knowledge of the person to be bound may be an important element in deciding whether a custom is reasonable or not.

It has, however, been held in several cases, that a local custom, or usage of a particular class of persons, is not binding upon persons living at a distance, and who are proved to have been wholly unacquainted with the custom. *Addison on Contracts*, 8th ed., page 204, citing *Bartlett v. Pentland* (l) ; *Kichen v. Venus* (m) ; *Sweeting v. Pearce* (n).

The contract between the plaintiffs and Crosby & Dimick is contained entirely in the telegram of the plaintiffs, making their offer, and the telegram of the others, accepting it. It was a complete contract as soon as the latter telegram (which contained the final assent) was despatched at Buffalo, and must be considered as a contract made at Buffalo. *Household Fire Insurance Co. v. Grant* (o) ; *O'Donohoe v. Wiley* (p). The performance of the contract, however, was to be entirely in the Province of Ontario : the vessel was there, and when released was to be delivered there (at Port Arthur).

Judge Story, in his work on *Conflict of Laws*, 7th ed., sect. 242, says, "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country ; for, as we shall see presently, in the latter case the law of the place of performance is to govern."

Again, at section 280, he says, "the rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication ; but where the contract is either expressly or tacitly to be performed in any other place, then the general rule is, in conformity to the presumed intention of the parties.

(i) L. R. 7 H. L. 838.

(j) 2 H. & N. 243.

(k) 1 Ex. 425.

(l) 10 C. B. 770.

(m) 12 Moo. P. C. 399 ; and 5 Jur. N. S. 355.

(o) L. R. 4 Ex. 216.

(p) 43 U. C. R. 380.

that the contract as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance."

Mr. Justice Willes, in giving the judgment of the Court of Exchequer Chamber in *Lloyd v. Guibert* (q), says, "It is, however, generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention; as, for instance, that the contract is entirely to be performed elsewhere, or that the subject matter is immoveable property situated in another country, and so forth: which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject matter. And from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract."

In *Addison on Contracts*, 8th ed., 195, it is said the *lex loci contractus* generally prevails in all that relates to the legal validity of the contract, the *vinculum obligationis*; and the law and custom of the place of performance in all that relates to the fulfilment of the contract, citing *Stott v. Pilkington* (r); and again, on same page, the rule governing the interpretation of a contract made in one country to be performed wholly or partly in another is that the law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of the power then ruling or as temporary residents owe that power a temporary allegiance; citing *Peninsular & Oriental Steam Nav. Co. v. Shand* (s). In that case, the defendant in appeal, who was an Englishman and up to that time had been living in and was just leaving England, had entered into a contract in England embodying terms which he afterwards sought to have declared invalid—as being so by the law of Mauritius, where the contract was to be performed; and the Court held that the evident intention of the parties was to treat the contract as an English contract, to be interpreted according to the rules of English law. The present case differs materially from that just referred to; in the present there was no provision made in the contract which it is sought to change, and the plaintiffs were not even temporary residents of the United States, and owed no allegiance, temporary or otherwise, to the Government of that country; and consequently the reasoning in the case referred to does not apply to them.

Applying the principles laid down by Judge Story and Mr. Justice Willes to the facts of the present case, I am of the opinion that the law and custom of Ontario must govern at all events in all that relates to the performance of the contract, and that any custom or usage affecting the mode or time of performance must be shown to exist and be required in Ontario.

(q) L. R. 1 Q. B. 122.

(r) 2 B. & S. 11.

(s) 3 Moo. P. C. N. S. 272; 11 Jur. N. S. 771.

The evidence of the defendants entirely fails in this respect. None of their witnesses speak as to any custom or usage in Ontario. They do not, indeed, speak of any particular place ; but being residents of the United States and carrying on business there, it must be assumed that they referred to the mode of doing business in their own country. At all events there is no positive evidence of the existence of such a custom or usage of trade in Ontario.

The case of *Wisconsin Marine & Fire Insurance Co. v. Bank of B. N. A. (t)*, is an authority that evidence of custom in the United States is not admissible in matters undertaken and to be performed in Ontario.

It is possible that if the defendants had entered into a contract with a person who was engaged in the wrecking business in the United States, and who was acquainted with all the customs and usages of that business in the States, to release a vessel on shore in Ontario, such a contract might be held to be within the principle of *Peninsular & Oriental Steamship Co. v. Shand*, cited above, and to be governed by the law and custom of the place where the contract was made, especially if the vessel when released was to be delivered in that country.

However, if it was necessary for me to decide whether such a usage as is claimed by the defendants has been shown to exist in the business of releasing wrecked vessels as carried on at the City of Buffalo, I should be of opinion that such a usage has not been satisfactorily established in the present case.

The unsatisfactory nature of the evidence by which such usages are sought to be established and the difficulty of dealing with it have been often spoken of by judges, and the present case is not an exception to this. The necessity of there being clear and distinct evidence of a known and received usage has always been recognized.

In the present case much of the evidence is only the opinion of the witnesses, and therefore of no weight or value. Another part of it is directed to show the reasonable character of the alleged usage, and the residue is of persons who say that they have never known of contracts for the release of vessels being made in the fall and extending over until the spring. None of these witnesses give any instances in which contracts made in the fall, and not completed at the close of navigation have been considered as terminated, nor did they say that they knew of any cases in which a claim had been made under such circumstances to proceed with the work in the spring. It cannot be but that instances have arisen, involving this question, but no evidence is given of any. Instead of the "multiplication of customs" spoken of by Lord Cranworth, there is an utter absence of instances, and only evidence of the most general character—evidence which I cannot think sufficient to establish a usage of trade.

It is not shown that the plaintiffs at the time they made the contract were aware that such a usage of trade as is now set up was alleged to exist. The two plaintiffs who attended the trial, John A. Graham and John L. Horne, both swore that they had never heard of it.

The statements of Mr. Miller in May, 1884, cannot affect a contract made the previous December.

(t) 21 U. C. R. 284.

If the usage had been shown by proper evidence to exist, I should not say that it was unreasonable or that it so conflicted with any terms in the contract that it was excluded from affecting it. I am of opinion that it is not proved to exist even at Buffalo. It certainly is not shown to exist in Ontario. I am also of opinion that even if it did exist at Buffalo it would not affect the present contract for the reasons I have given.

The defendants, however, contended that the conduct of the plaintiffs, the language of their telegram, and the circumstances surrounding the transaction show that the contract was a time contract, and that the limit of the time of performance was the closing in of the winter.

Where a contract is in writing, and is entirely silent as to the time of performance (as this is) it is not easy to see how a certain time can be fixed for the performance. Under such circumstances, the law implies that it should be performed within a reasonable time according to the circumstances, and will not permit this implication to be rebutted by extrinsic evidence going to fix a definite term, because this varies the contract; 2 *Parsons on Contracts*, 7th Ed., 794. Contemporaneous parol agreements may, however, sometimes be admitted as bearing upon the question of reasonable time; same vol. p. 683, note (a). And see the case of *Ellis v. Thompson* (u).

The situation of the parties and of the property which is the subject matter of the contract, and the intention and purpose of the parties in making the contract will often be of great service in fixing the construction, because this intention will be carried into effect as far as the rules of language and the rules of law will permit; 2 *Parsons*, 631.

I have no doubt, considering the position of the *Van Straubenzie*, and the risk of her being destroyed or injured by storms while in that position, that the defendants' agents were desirous that she should be released as soon as possible, and the language of the plaintiffs' telegram shows that they were desirous of going to work as soon as possible.

It was to the advantage of both that this should be done; the loss of the vessel would deprive the plaintiffs of the chance of making the \$3,500, and the defendants of whatever she was worth above that sum. So far as the evidence goes, the plaintiffs seem to have been more urgent than the defendants. Plaintiffs' telegram of the 6th December, says: "must have answer at once," giving reasons which indicate their anxiety to get to work at once; the defendants' agents do not answer this until the 8th December. It is possible there was some delay in the transmission of the plaintiffs' message, although it is not shown.

This anxiety of the plaintiffs is urged as an evidence of their consciousness that their contract did not extend over until spring. I do not think this is a fair inference to draw. The danger of their losing their commission through the destruction of the vessel in the winter is quite a sufficient reason for their anxiety to proceed at once.

The plaintiffs' letters of the 15th December, 1883, to Crosby & Dimick, and the visit of the two Grahams in the following January to Crosby & Dimick's office are all referred to as showing that the plaintiffs considered the contract had terminated.

(u) 3 M. & W. 445.

I am unable to see any evidence of this in the letter. In my opinion the letter is quite as consistent with the intention on the plaintiffs' part of going on in the spring, as of doing nothing further.

Upon considering all the evidence of what transpired at the interview at Crosby & Dimick's office, I do not think it is shown that anything was said by the Grahams that indicated either an abandonment of the contract by them or a consciousness on their part that it had terminated, or that anything was said by Nickerson to the Grahams that indicated that he considered the contract at an end, or that amounted to a notification to them to that effect. It was also urged that the large sum asked and agreed to be paid sustained the view that the contract was to be performed before winter.

I am of opinion that neither the terms of the contract nor the evidence of the surrounding circumstances warrant my holding the contract to be one to be performed within a fixed period, that is, before the setting in of winter; and that time was the essence of the contract.

By a reasonable time is meant reasonable under the circumstances in the ordinary course. If the performance was prevented by something unforeseen, and beyond the control of the plaintiffs, this would not excuse them; *Ford v. Cotesworth (v)*.

I believe that the plaintiffs did all that could be done under the circumstances to obtain the necessary assistance, but that the bad weather prevented their getting the benefit of these arrangements; the defendants, however, had a right to expect they would have proper tugs and appliances to carry out their contract, and if they failed in a reasonable time for want of these the defendants would be justified in annulling the contract.

The degree of power required to release a wrecked vessel must necessarily vary with the position of the wreck and surrounding circumstances, and it is impossible to say how much is required until these facts are known. The time must also be uncertain; although this must depend in a great measure on the power employed.

In cases where the position of the wrecked vessel is unknown, it must frequently happen that the tug at first employed proves insufficient to release the vessel, and assistance has to be obtained. In all cases, however, a reasonably sufficient tug ought to be employed in the first instance and especially when bad weather may naturally be looked for.

In the present case, the period of time during which it was practicable to work at the vessel after the plaintiffs got to it in December was only a part of one day, so short a time that it is doubtful whether, even if the plaintiffs had taken two tugs, they could have got the vessel off.

Taking all the circumstances into consideration, I do not think that the plaintiffs had a reasonable time in which to release the vessel, after they received the acceptance of their offer, before the winter set in, and further work became impossible. There was a possibility that the release might have been effected, but it seems to me quite as likely that, with the best appliances, the attempt would have failed.

The defendants do not seem even to have claimed that the contract was at an end until after they had received the plaintiffs' account claiming the \$3,500. As I have already said, I do not think that the plaintiffs ever abandoned the contract, or did anything to lead the defendants' agents to suppose they had done so, and the defendants certainly never notified the plaintiff that they considered the contract at an end.

The last argument of the defendants is that the amount claimed is excessive, and that the agreement being one for salvage services, it must be shown to be just before it will be enforced by the Courts.

It is no doubt laid down in works on Shipping, that if the parties specially agree for a stated sum to give the assistance actually rendered, they are bound by their contract, but the party setting it up is required by the Court of Admiralty not only to prove that it was made, but also that it was just. The case of the *British Empire* (u), is usually cited in support of this proposition. That report does not state the facts of the case, but merely reports it for the sake of the remark of the judge on this one point.

It will be observed that the rule in its terms applies to agreements made with the masters of ships; and the cases in which I have found the agreements disregarded by the Courts are all cases in which the agreement was so made.

The case of the *American* (v) is one in which a master was induced to promise to pay £500 sterling to the owner of a steamer to go a short distance from harbour to relieve a vessel which, with only one man (the mate) on board, was drifting towards a dangerous point in the Gulf of St. Lawrence. The master was at the time on shore, and greatly excited by seeing the extreme danger in which his vessel and mate had been placed, and was also influenced by the threats of the rest of the crew in case he did not assent to the terms of their demand: the Court awarded £125 sterling and costs.

Other cases can be found in which the masters of vessels have imposed on the ignorance of the salvors, and got them to agree to accept a ridiculously small amount: in such cases the Court has held the salvors not bound by such agreement, and has awarded a reasonable compensation.

There is no pretence that any advantage was taken of the defendants in the present case. They had ample time to consider the proposal made, and they deliberately accepted it.

I therefore think that the plaintiffs are entitled to the amount of \$3,500.

(u) 6 Jur. 618.

(v) 2 Stu. V. A. R. 214.

THE CANADIAN LAW TIMES.

VOL. VI.

FEBRUARY, 1886.

No. 2

THE HUSBAND'S RIGHT TO VOTE ON HIS WIFE'S PROPERTY.

RECENT Imperial and Provincial Legislation respecting the Property of married women appears to have operated silently but most effectually in depriving married men of their estate in, and therefore of their common law right of voting in respect of, their wives' properties. And some contests will doubtless take place before the Revising Officers under the new Franchise Act to test how far Provincial Legislation has severed the legal unity of husband and wife, and divided "that compound person" what the law formerly recognized.

The Franchise Act gives a married man the right to vote in respect of his wife's real estate in three classes of cases, where he is (1) proprietor in right of his wife in the Province of Quebec; (2) proprietor in right of his wife elsewhere than in the Province of Quebec; and (3) occupant in right of his wife, or in the enjoyment of the revenues and profits for his own use or for the use of his wife.

In Quebec the Act says: (sec. 2), "'Owner,' when it relates to the ownership of real property situated in the Province of Quebec means 'proprietor,' or 'usufructuary,' (*usufruitier*), either in his own right or in the right of his wife, of real property in 'franc alleu,' or in free and common soccage."

The definition of "Owner" in the Quebec Provincial Election Act (a), is "any one who possesses real estate, or whose wife possesses real estate, whether as owner or usufructuary,"—a definition which frankly acknowledges the wife's title, not the husband's, as giving the qualification to vote, but conferring upon the husband the vicarious right to vote in his wife's place and stead.

The Quebec law respecting the property of married women is more elastic than that of the other Provinces which have annihilated the old doctrines of the common law and given the married woman a legal individuality apart from her husband. The following short note to the section above quoted which will shortly be published with the Franchise Act will explain this:—

The words "proprietor in the right of his wife" first appear in 22 Vict. cap. 82 sec. 23 (b). The former words were "come to him by marriage or contract of marriage" (c). The definition in the Quebec Election Act of 1875 is: "one whose wife possesses real estate," and is more appropriate in view of the recent legislation respecting the property of married women. There are three kinds of marriage contracts in Quebec under which the rights of the husband are different: (1) community of property; (2) simply excluding community; and (3) separate as to property. In the absence of a marriage settlement or covenants, the consorts are presumed to have intended to subject themselves to a community of property which is irrevocable as soon as the marriage is celebrated (d). A wife cannot bind herself either with or for her husband otherwise than as being common as to property (e). The husband alone administers the property of the community. He may sell, alienate, or hypothecate it without the concurrence of his wife (f). Husband and wife in community enjoy the bene-

(a) 38 Vict. cap. 7.

(b) C. S. C. cap. 6, sec. 5, sub-sec. 4.

(c) 12 Vict. cap. 27, secs. 30, 31.

(d) Civil Code L. C. sec. 1200; *Hughes v. Rees*, 5 Ont. R. 654.

(e) Civil Code L. C. sec. 1301.

(f) *Ibid.* sec. 1292.

fit of the issues and profits of the *propres* on either side, and are bound to discharge the rents with which they are burdened (g). If the marriage contract simply excludes community, the wife holds her property as separate estate, but the husband has the rights of a usufructuary (h). But where the contract is that the wife shall be separate as to property, the wife has the entire administration and free enjoyment of her property (i), in which case the husband has no estate in, and no right of possession of, the wife's property, it being "separate estate." Where the wife, separate as to property, leaves the enjoyment of her property to her husband, the latter on demand of the wife, or on dissolution of the marriage, must give up the parts then existing, and is not accountable for those previously consumed : *Ibid.* sec. 1425.

Henry VI. of England, in 1441, conceded in favour of the citizens of Paris that a wife's share in the community should not be subject to confiscations pronounced against the husband, a privilege which was continued after the expulsion of the English (j).

The question whether a husband has the right to vote where his wife's property is settled as separate estate will be considered in the note to the section affecting that right in the other Provinces.

In defining the term "owner" for the Provinces other than Quebec, the Franchise Act says :—" 'Owner,' when it relates to the ownership of real property situate elsewhere than in the Province of Quebec, means proprietor either in his own right or for his own benefit, or if such proprietor be a married man, it means the proprietor in his own right or in the right of his wife, of freehold estate, legal or equitable in lands and tenements held in free and common soccage, of which such person is in actual possession or is in receipt of the rents and profits."

(g) *Girard v. Lemieux*, 2 Rev. L. 78.

(h) Civil Code L. C. secs. 1416-20.

(i) *Ibid.* sec. 1422.

(j) Spence's Orig. Laws, 372.

The Ontario Franchise Act (*k*), provides that: " 'Owner' shall signify and mean proprietor, either in his own right or *in the right of his wife*, of an estate for life, or any greater estate, legal or equitable." And that 'occupant' shall signify and mean a person *bona fide* occupying property otherwise than as owner or tenant, either in his own right or *in the right of his wife*, but being in possession of such property, and enjoying the revenues and profits arising therefrom to his own use.

In New Brunswick, the right to vote at provincial elections is conferred on those who are "assessed" for real or personal property or both, apart from any question of title (*l*). And the Provincial Assessment Act provides that, "Real Estate held as the separate property of a married woman is to be rated in the name of her husband" (*m*).

Neither the Nova Scotia Franchise Act (*n*), nor the Manitoba Election Act (*o*), provides for a husband voting in respect of his wife's property.

British Columbia and Prince Edward Island enjoy manhood suffrage in Dominion and Provincial elections.

The construction to be placed on these definitions in the revision of the voters' lists will doubtless give rise to much controversy, especially with the light thrown upon the question by recent cases in Ontario and England. In the former, *Donnelly v. Donnelly* (*p*), following *Symonds v. Hallett* (*q*), decides that a married woman, carrying on a business of her own, may obtain an injunction restraining her husband from interfering with her business or removing any of her chattels; and may also, under certain circumstances, have an injunction excluding her husband from her house. In *Weldon v. DeBathe* (*r*) the right of a husband to enter the house occupied by his wife, except in his

(*k*) 48 Vict. cap. 2.

(*l*) C. S. N. B. cap. 4.

(*m*) C. S. N. B. cap. 100.

(*n*) 48 Vict. cap. 2.

(*o*) C. S. Man. cap. 3.

(*p*) 9 Ont. R. 678.

(*q*) 24 Ch. D. 346.

(*r*) 14 Q. B. D. 339.

domestic capacity as husband, was queried ; and in giving judgment, Lindley, L.J., said : " The right of possession of the property to which a wife is entitled to her separate use, is an exclusive right against her husband ; and, whatever his rights are, he cannot authorize anybody to intrude on the possession of his wife's property." And the case of *Butler v. Butler* (s) shows that a husband may obtain judgment and execution against his wife's separate property for moneys lent to her, or moneys paid for her at her request, after the marriage.

In the light of these decisions, the following summary of the cases and of the Provincial statutes affecting this branch of the electoral franchise, has been appended to the above clause in the forthcoming edition of the Franchise Act.

" Proprietor in right of his wife." This definition of a class of voters entitled to the " ownership of real property " is based upon the rule of the common law that a husband by his marriage acquired a freehold interest *jure uxoris* during the joint lives of husband and wife in his wife's freehold for life, and her freehold of inheritance, even before the birth of issue (t). Thus where an estate in fee comes to a *feme covert*, the interest of the husband and wife in the estate is a seisin in fee in both, in right of the wife (u). And upon his having issue by her born alive who could inherit the estate, he becomes tenant by the curtesy, which entitles him to an estate in his wife's freehold for his life after the death of his wife (v). " When husband and wife take an estate to themselves *jointly* during the coverture, they have neither a joint estate, a sole or several estate, or an estate in common ; but their interest is denominated tenancy *by entreties*. From the unity of their persons by marriage, they have each the whole estate in the parcels entirely, as one person ; and on the death of one of them the entire tenement, for all the estate, belongs

(s) 14 Q. B. D. 831.

(t) *Bright's H. & W.* 112.

(u) *Polybank v. Hawkins*, Doug. 829.

(v) *Bright's H. & W.* 116.

to the other " (*w*). But if the husband is an alien, he will take no interest in his wife's real estate (*x*). Nor will he acquire any right in his wife's leaseholds (*y*).

Where a married woman obtained a grant of land under letters patent from the Crown, her husband need not have entered upon the land in order to entitle him to tenancy by the curtesy, the letters patent *suo vigore* constituting seisin in fact (*z*). A grant to a married woman of a life estate in lands does not require the assent of her husband to pass the title to her ; and unless he repudiate it in some way, both will be seised in her right (*a*). Though a man has been in possession for twenty years of lands granted to his wife for life, he does not thereby acquire a title by virtue of the Statute of Limitations, for he is merely seised with her, by operation of law, of her estate therein (*b*). Where it is sought to establish a marriage by repute, it is essential that such repute should be general and uniform ; a divided repute will not suffice (*c*).

By the Roman law when the wife passed *in manum viri*, all that she had belonged to her husband ; but when she did not, all her property belonged exclusively to herself (*d*).

Among the semi-barbaric nations of a later time, marriage was a species of partnership, in which husband and wife had each their separate rights. Any profits or purchases with their joint property were divided between them in proportion to their separate property (*e*).

Under the common law of England, as under the Roman law, married women were more helpless than infants and lunatics, the two other classes of persons under disability in whose company she habitually figured in English law. Everything she acquired at or after marriage went to her

(*w*) *Co. Litt.* 740.

(*x*) *Ibid.* 9.

(*y*) *Theobald v. Duffoy*, 9 Mod. 104.

(*z*) *Weaver v. Burgess*, 22 C. P. 104.

(*a*) *Nolan v. Fox*, 16 C. P. 565.

(*b*) *Ibid.*

(*c*) *Henderson v. Weis*, 25 Gr. 69. See also *Roblin v. Roblin*, 28 Gr. 439.

(*d*) *Sanders' Just.* 242.

(*e*) *Spence's Orig. Laws*, 373.

husband unless she had a settlement to her separate use. She had no legal individuality apart from her husband. In a Court of Equity (though not in law) *baron* and *feme* are considered as two different persons (*f*). Where a gift was made, or an estate was conveyed, to a husband and wife and a third person, the husband and wife, being in legal fiction one person, took only one half of the gift or estate, and the third person the other half (*g*). Recent legislation, however, has altered this old doctrine of the common law, so that now the wife would take her one-third equally with her husband and such third person.

“The Act [45 & 46 Vict. cap. 75, Imp.] makes such alterations in the relation of husband and wife that it severs that unity of person and divides that compound person, which the law formerly recognized, to such an extent as to render it wrong for the Courts now to apply the old principle, which was founded on unity of person (*h*). “The old-fashioned notion that women need legislative protection, even against their husbands, is fast fading in the light of modern legislation (*i*).

Where recent Provincial legislation has not altered the common law doctrines respecting married women, the right of the husband to vote as “proprietor in right of his wife” will be governed by the old decisions. By the common law the husband has *jure mariti* the right to vote in respect of his wife's freehold property, as having acquired the estate through marriage (*j*). So that if an estate should descend to any number of females the husband of each would have a right to vote (*k*). A husband, while possessed in the right of his wife, has the same right of voting as if possessed in his own right (*l*). But in all these cases of

(*f*) 3 P. Wms. 38 n.

(*g*) *Co. Litt.* 739; *Dias v. DeLivera*, 5 App. Cas. 135.

(*h*) *Per Chitty, J.*, in *Re March*, 24 Ch. D. 222.

(*i*) *Per Harrison, C. J.*, in *Kerr v. Stripp*, 40 U. C. R. 134.

(*j*) *Rogers on Elections*, 159.

(*k*) *Co. Litt.* 59.

(*l*) 1 *Stephens on Elections*, 513.

freeholds *jure uxoris* it is the *beneficial* freehold, not the mere legal estate, which confers the vote on the husband (*m*).

Prior to the Married Woman's Property Acts a husband excluded by a marriage settlement from all interest in his wife's estate, could not vote (*n*). Where by a marriage settlement property is vested in trustees for the separate use of the wife, or where property, after the marriage, is conveyed or devised to trustees for the separate use of the wife, the husband takes no interest in such property, and can by no means vote in respect thereof (*o*). So where the intention appears that the property bequeathed to, or settled upon, the wife should be to her sole and separate use, whether given to her without the intervention of trustees, or to her husband for her, a Court of Equity will effectuate the intention by converting the husband into a trustee for the wife (*p*). Where there is a settlement to a wife's separate use, the husband acquires no interest in her property (*q*). And such settlement to her separate use, though made when she is *discover*t, is good against an after-taken husband (*r*). No technical words are necessary to raise a trust for such separate use (*s*). "Enjoy the profits," imply separate use (*t*). So "to be at her own disposal" (*u*); or, "for her livelihood" (*v*); or, "her receipt to be a sufficient discharge" (*w*); or, "to deliver securities to her whenever demanded" (*x*); or, "to pay into the proper hands of A" (*y*). Where one C. married a widow who was entitled to an estate tail, and previous to the marriage C. and his intended wife joined in a deed to V. as trustee, in which C.

(*m*) 1 *Stephens on Elections*, 516.

(*n*) *Rogers on Elections*, 35.

(*o*) *Elliott on Parly. Electors*, 15.

(*p*) *Ibid.*

(*q*) *Scarborough v. Borman*, 1 Beav. 34; S. C. 4 Jur. 38.

(*r*) *Tullett v. Armstrong*, 4 My. & Cr. 377; S. C. 4 Jur. 34.

(*s*) 9 *Jarm. Convey.* 102.

(*t*) *Tyrell v. Hope*, 2 Atk. 361.

(*u*) *Pritchard v. Ames*, T. & Russ. 222.

(*v*) *Darley v. Darley*, 3 Atk. 399.

(*w*) *Lee v. Priaux*, 3 Bro. C. C. 381.

(*x*) *Dixon v. Olmius*, 2 Cox 414.

(*y*) *Hartley v. Hurle*, 5 Ves. 540.

covenanted with the trustee V. that the rents and profits should remain to the separate use of the wife, that the wife might dispose of the estate, and that he would join in all necessary acts for rendering her disposal valid; it was contended that, as C. had no right to receive any profit from the land, it could not be said that he had any freehold which would entitle him to vote: *Held*, that C. had no right to vote (z). As C. had no right to receive any profits from the land, it could not be said that he had a freehold of the value of 40s. a year, and upon this ground the vote was rejected (a). Where the wife's estate was assessed in the name of the wife and of her tenant, it was held that the husband could not vote (b). A wife's estate was assessed in the name of her guardian, from whom, on coming of age about two years before, she had obtained the possession; the husband, before and after his marriage, had been in the possession of the estate as tenant, and had been so assessed. *Held*, vote bad (c). One R. claimed to be seised in fee in right of his wife under a devise to her *dum sola* to her separate use. It was contended that an absolute estate having been given to the wife *dum sola* the limitation to her separate use was repugnant to the nature of the estate limited to her, and was therefore void. This contention was held to be at variance with the long established doctrine of Courts of Equity, and R.'s vote was rejected (d). One W. devised his real estate to trustees to the use of the wife of B. for her life, remainder to her eldest son, and remainders over. The estate was in the possession of a tenant. B., by deed to which his wife was not a party, covenanted with each of his nine sons to stand seised to each of them of an undivided moiety as to one-ninth of such moiety for the joint lives of himself and each of such sons. By another deed he granted the other moiety to his son-in-law for their joint lives. On this case counsel was of opinion

(z) *Bedfordshire (Conquest's Case)*, 2 Lud. 422.

(a) 1 *Stephens on Elections*, 546.

(b) *Bedfordshire (Brasier's Case)*, 2 Lud. 530.

(c) *Ibid.* (*Joyce's Case*), 529.

(d) 1 *Stephens on Elections*, 513.

that B. had a freehold in right of his wife, and was able to confer a freehold interest on his grantees for the joint lives of himself, his wife, and each specific grantee; and that, as to the sons, the deed operated either as a covenant to stand seised, or as a grant of the reversion; and as to the son-in-law, it operated as a grant of the reversion: *Ibid.* 515. Between the registration and the election the voter, by a deed of separation between him and his wife, covenanted with her trustee that while they lived apart she should have "undisturbed possession" of the house for which he was on the register of voters, and that "if he should enter therein" he should "be deemed a trespasser." *Held*, vote good (e).

Estates by the curtesy and in dower are estates for life, arising as they do out of marriage, and those entitled to such estates in right of their wives may vote without occupation (f). Tenants by the curtesy vote as freeholders (g). Where the right of election was vested in freeholders of inheritance, a tenant by the curtesy voted, but on contestation the vote was abandoned by the candidate for whom he voted (h). The second husband of a doweress is entitled to vote in respect of his wife's estate in dower, although such dower "has not been assigned or set out by metes and bounds," provided he is in receipt of the profits thereof (i). In Prince Edward Island the husband of a doweress, where the dower has been set off and reduced into possession, may vote (j). The Ontario Election Law of 1868, by the definition of "owner," gave to a husband whose wife had an estate for life, or a greater estate, the right to vote in respect of his wife's property, and a petitioner having that qualification was held entitled to petition (k). Where the owner of real estate died intestate leaving daughters, and

(e) *Lichfield (Stringer's Case)*, Bar & Aus. 372.

(f) *Rogers on Elections*, 9.

(g) *Chambers' Dict. of Elections*, 368.

(h) *Tavistock*, 10 Com. J. 576.

(i) 20 Geo. III. cap. 17, sec. 12 (Imp.). *Quære*, if this statute is in force in Ontario: R. S. O. cap. 92.

(j) 19 Vict. cap. 21, sec. 29, P. E. I.

(k) *Prescott*, Ho. E. C. 1.

the husband of one of such daughters leased the property and received the rents; *Held*, not entitled to vote (*l*).

The recent legislation in the various Provinces respecting the Property of Married Women, and its effect on the husband's common law right to vote *jure mariti*, will require careful consideration in construing the above clause.

In *Ontario*, R. S. O. cap. 125, and 47 Vict. cap. 19, have made the property of a married woman (1) "separate estate;" have freed it from (2) the husband's joint ownership; (3) all his right to the rents, issues and profits thereof; have abolished (4) his tenancy by the curtesy, except where the wife had not disposed of her estate *inter vivos* or by will. "The operation of this section (R. S. O. cap. 125, sec. 4), is to *divest* the husband of all estate and interest in the real estate of his wife" (*m*). "She is to hold it free from any estate of the husband during her life-time, or as tenant by the curtesy, thus depriving him of any interest in her estate" (*n*). Such portions of the Act as would deprive parties of their vested rights, if held to affect women married before its passing, should be so read as not to interfere with such rights; while the portions of the Act which have not that effect should go into operation as regards women married before as well as after the 2nd March, 1872 (*o*). It applies to lands acquired after that date by women who were married prior to the Act (*p*); and to marriages which take place after the Act (*q*). The Act of 1884, 47 Vict. cap. 19, O.—based on the Imperial Act, 45 & 45 Vict. cap. 75—repeals R. S. O. cap. 125, and enables a married woman to convey her own real estate, or to release her dower in her husband's lands without her husband joining in the conveyance (sec. 22). See also, *Re Coulter & Smith* (*r*).

(*l*) *Brockville (Leslie's Case)*, Ho. E. C. 129.

(*m*) *Per* Gwynne, J. in *Merrick v. Sherwood*, 22 C. P. 477.

(*n*) *Boustead v. Whitmore*, 22 Gr. 226.

(*o*) *Adams v. Loomis*, 22 Gr. 99.

(*p*) *Ibid.* 24 Gr. 242.

(*q*) *Dingman v. Austin*, 33 U. C. R. 190.

(*r*) 8 Ont. R. 536.

New Brunswick (s) provides that real property belonging to a woman before, or accruing after, marriage except such as may be received from her husband while married, "shall vest in her and be owned by her as her separate property," free from the debts of or disposal by her husband without her consent; but liable for her debts contracted before marriage, and judgments against her husband for her torts.

Nova Scotia (t) provides that a woman married before the Act (19th April, 1884) shall hold her property, not taken possession of by her husband, free from his debts and control, as if she were a *feme sole*; and that a woman married after the Act shall hold her property to her "separate use," free from any estate and debts of her husband during her lifetime; but the husband's tenancy by the curtesy is preserved where the wife has not disposed of her estate during her life-time, or by will (u). Rents, etc., in all cases to be her "separate property," and her receipts alone to be valid; but her husband may be her agent to collect them (v). But by sec. 7, "any estate or interest to which a husband may, by virtue of his marriage, be entitled in the real property of his wife, whether acquired before or after the passing of this Act," is not during her life to be subject to his debts.

Manitoba (w) provides that every woman married after the Act (14th May, 1875) shall hold her real property free from the debts, control and disposition of her husband without her consent, as if she were a *feme sole* (x); and that a woman married prior to the Act shall hold her real estate not then taken possession of by her husband as if she were a *feme sole* (y). "Any estate or interest to which a husband may, by virtue of the marriage, be entitled in the real property of his wife shall not, during her life, be subject to the debts of her husband" (z). By sec. 19, the real estate mentioned in ss. 1 and 2, and the rents, issues and profits thereof, subject to the trusts of any settlement,

(s) C. S. N. B. cap. 72.

(u) Sec. 4.

(w) C. S. Man. cap. 65.

(y) Sec. 2.

(t) 47 Vict. cap. 12, N. S.

(v) Sec. 6.

(x) Sec. 1.

(z) Sec. 12.

shall "be held and enjoyed by any married woman for her separate use, free from any estate or claim therein or thereto of her husband during her life-time, as tenant by the curtesy or otherwise ; and her receipts alone shall be a discharge for any rents, issues and profits of any such real estate." It also enables her to make alone a deed, or deeds of her real estate, and to make contracts, promissory notes, etc., without the assent of her husband, as if a *feme sole* ; and "no possession, whether actual or constructive, of the husband of any property, real or personal, of a married woman shall give the husband any title thereto, as against his wife, during her life-time."

British Columbia.—By the 36 Vict. No. 29, the real estate of any married woman, owned by her at the time of her marriage or acquired during coverture, and the rents, issues and profits thereof, shall, without prejudice to the trusts of any settlement, "be held and enjoyed by her for separate use, free from any estate or claim of her husband during her life-time, or as tenant by the curtesy ; and her receipts alone shall be a discharge for any rents, issues and profits ; and any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*." By sec. 7, the husband is not liable for the contracts made by his wife before marriage. But an amending Act of 1883 recites that "it is not just that the property which a married woman has at the time of her marriage should pass to her husband, and he should not be liable for her debts contracted before marriage," amends the above sec. 7, and provides that "a husband and wife married after the passing of this Act may be jointly sued for any such debt." It then limits the husband's liability to the extent of certain assets, viz. : "The value of the chattels real of the wife which shall have vested in the husband and wife. The value of the rents and profits of the real estate of the wife which the husband shall have received."

Prince Edward Island (a).—Where a married woman is

(a) 23 Vict. cap. 35, P. E. I.

deserted by her husband, her property vests in her free of his debts or control.

The cases prior to the recent legislation respecting the property of married a women noted above, show that, where wife's property had been settled upon her as "separate estate," or to her "separate use," the husband took no estate or interest in such property "in right of his wife," and therefore had no vote. And where recent Provincial legislation has made the wife's property "separate estate," her husband, having no estate therein, and having no right of possession, except in the domestic relation of husband, it would seem to follow that he is not qualified to vote as "proprietor in right of his wife." Should this be found to be law, his right to vote may, perhaps, be arguable under the clauses defining "occupant" if he be in actual occupation of real property otherwise than as owner "in right of his wife, *and* who receives to his own use and benefit the revenues and profits thereof," provided the word "and" can be read as "or," for "the fair and rational construction of the statute"; or if such reading would "answer the sense of the statute" (b). "When the sense is the same they are all one, and the words conjunctive and disjunctive are to be taken *promiscue*" (c). "In common conversation the word 'or' is frequently used for 'and' and the word 'and' for 'or'" (d).

This construction however, is not free from doubt owing to the phraseology used in the clauses referred to. The words used in the clause defining "occupant," being in the case of a married man in actual occupation of real property in the right of his wife, *and who receives to his own use and benefit the revenues and profits thereof*; and in the clause prescribing the qualifications for occupants being, in the case of a married man being an occupant and in the enjoyment of the revenues and profits of real property for one year for his own use or the use of his wife.

THOMAS HODGINS.

(b) Dwarries on Statutes, 682.

(c) *Creswick v. Rokesby*, 2 Bulst. 47.

(d) *Seccombe v. Edwards*, 28 Beav. 440.

EDITORIAL REVIEW.

Contempt of Court.

We have some reason to believe that the place at which this is written is beyond the jurisdiction of Mr. Travis, one of the Stipendiary Magistrates of the North-West Territories; otherwise, we frankly confess that we should hesitate to discuss the law as to contempt of Court as revealed in Mr. Travis' Court.

By The North-West Territories Act, 1880, sec. 76, "Each Stipendiary Magistrate shall have the magisterial and other functions appertaining to any Justice of the Peace, under any laws or ordinances which may, from time to time, be in force in the North-West Territories, and shall also have power to hear and determine any charge against any person for any criminal offence alleged to have been committed in the North-West Territories, etc."

By section 73, "The Lieutenant-Governor may appoint Justices of the Peace for the North-West Territories, who shall have jurisdiction as such throughout the same."

As far as a perusal of the Act enables us to say, we believe that the status of a Stipendiary magistrate is not otherwise defined. Acting as such, Mr. Travis committed to gaol and heavily fined an editor for commenting in his paper upon a severe sentence passed by him upon a prisoner tried before him and convicted.

In Bacon's Abridgment, Title, Justices of Peace (E), it is said, "And in some cases, if the Justice shall act in his own cause, it seemeth to be justifiable, as when a justice shall be assaulted; or (in the execution of his office espec-

ally), shall be abused to his face, and no other justice present with him; then, it seemeth, he may commit such offender until he shall find sureties for the peace for his good behaviour, as the case shall require; but, if any other justice were present, it were fitting to desire his aid. Whether a magistrate, not sitting as chairman of a court, but in his private office, can commit for a contempt, does not seem to be expressly decided. But, if he can so commit, it is most clear that he cannot do it by word of mouth only, without warrant in writing." The case cited for the latter proposition is *Mayhew v. Locke*, 7 Taunt. 63, where a constable told a justice that he would serve no more warrants for him. The magistrate ordered him into "the cage"; and in an action against the magistrate for false imprisonment, it was held that whatever his powers might be in that respect, he could not, at any rate, commit without a warrant.

And again, same title (F), the same authority says, "A justice of the peace is strongly protected by the law in the execution of his office. He is not to be slandered or abused: if he is slandered in his presence he may commit, or indict the party; if in his absence, he is entitled to redress himself by action."

The latter passage is somewhat more explicit than the former, distinguishing, as it does, between a slander in the face of the magistrate when he is exercising his functions, and a slander not uttered in Court. And if the passage is authoritative, it seems that Mr. Travis went beyond his jurisdiction.

The matter of attachment for contempt of Court is discussed at great length in *Regina v. Wilkinson—Re Brown*, 41 U. C. R. 47. At p. 98, Harrison, C.J., says, "There are three different kinds of contempt punishable by attachment:—1. Scandalizing the Court itself. 2. Abusing parties who are concerned in cases. 3. Prejudicing mankind against persons before their cause is heard." Commenting upon a sentence comes within the first class, if a contempt. The same learned Judge, as to this, says, at p.

107, "The temperate and respectful discussion by the newspaper press of the determinations of our Courts of Justice is not to be interdicted, but the mere invective and abuse, and still more, the imputation of false, corrupt, or dishonest motives to those who are engaged in the administration of justice, is not to be tolerated." At the same page Grose, J., in *Rex v. White*, 1 Camp. 359, is quoted as follows:—"They had transgressed the law, and ought to be convicted, if the extracts from the newspaper set out in the information, contained no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the character of individuals, and to bring into hatred and contempt the administration of justice in the country." Again, at page 113, Harrison, C.J., says, "No judge objects to have his errors, or supposed errors, whether of fact or law, honestly and temperately pointed out. But it is a very different thing to impute base motives to the Judge, impugn his honesty, and proclaim him guilty of wilful falsehoods in his judicial utterances." So far as the public have been informed, there was nothing in the editorial in question which went to the extreme limits with which this case bounds the right of discussion. An article may be disagreeable in tone or substance—many truths are disagreeable to persons who regret that they are truths—it may be false in logic; yet if it is a debate which errs only in judgment, it seems not to come within the authorities, and at any rate it were better let alone. The dignity of the Bench does not require that every distasteful publication should bring down a severe punishment upon the publisher. It is preserved not by means of the executive force in the administration of justice, but by the cultivation of uprightness, learning, a dignified demeanor, and even-handed dealing. A judge who flies for a constable whenever he considers himself insulted is much more likely to bring the administration of justice into contempt than one who passes over in dignified silence remarks made upon the performance of his duties which are even contemptuous in tone. To quote again from *Regina v. Wilkinson*, Mr. Justice

Morrison, at page 124, says, "My duty as a Judge is to administer the law as I find it; but if I am at liberty to express any personal opinion upon the expediency of exercising the power of the Court to summarily punish contempts not committed in its presence, and not calculated to obstruct the course of justice, but by the publication of libellous matter unfairly criticising or impugning the action of the Court, or imputing impure or corrupt motives to its members, I would venture to say that in such cases the exercise of this arbitrary power would be a questionable remedy, either for maintaining respect for the Court itself or vindicating the characters of its members."

The New Rules.

The new rules, the draft of which we reviewed some time ago, 5 C. L. T. 448, have now been published.

Provision is made for trying non-jury cases at either the Chancery sittings or assizes as the plaintiff may elect. Actions in the Chancery Division proper for a jury are to be tried at the assizes without special order. This is one step towards a consummation doubtably to be wished, viz: the division of cases into jury and non-jury cases, with one sitting of the High Court for all trials.

By a not very clearly worded rule it is provided that a party in default in pleading may be noted in default in the pleadings book, after which he cannot plead without an order.

Examination for discovery is now to be had by subpoena and appointment without affidavit; and provision is made for examining witnesses on pending motions.

Reports are to be filed at Osgoode Hall and not in the local offices.

Motions requiring to be set down may be set down, at latest, on the day before the Court sits.

The death of either party to an action between verdict and judgment is not to abate the action.

These are the chief changes. We still require some rules; the most prominent necessary reform being a rule which will prevent such a miscarriage of justice as there was in *Bell v. Fraser*, 5 C. L. T. 508. Without impugning the soundness of the ruling opinion in the slightest, it is most evident that where a defendant pays money into Court in satisfaction of the plaintiffs claim, if any, he should get it back if the plaintiff has no cause of action. The present rule as it stands is a snare. With *Bell v. Fraser* as law, the rule is useless, because no one will pay money into Court under its provisions. And so a rule ought to be framed which would allow a defendant to pay into Court conditionally what he says will satisfy the plaintiff if he has a cause of action.

BOOK REVIEWS.

Forms in Conveyancing, comprising precedents for ordinary use, and clauses adapted to special and unusual cases. With practical notes. By LEONARD A. JONES, author of *Treatises on "Mortgages of Real Property," "Chattel Mortgages," "Railroad Securities," "Pledges and Collateral Securities,"* etc. Boston and New York: Houghton, Mifflin & Co., 1886.

This book is compiled for use in the United States, as one might naturally suppose, and accordingly has but a local value for most of its substance. Nevertheless, there are many forms of general and useful application which will make it a book of general reference.

It is pleasing to notice that Mr. Jones has shorn his forms of all that unnecessary verbiage which is so common in conveyancing precedents.

Laws of Intestacy in the Dominion of Canada. By J. ARMSTRONG, Q.C., C.M.G., late Chief Justice, St. Lucia, W. I. Montreal: John Lovell & Son, 1885.

This little book in pamphlet form contains in condensed space all the laws of Canada respecting the descent and distribution of real and personal property on an intestacy. The learned author prefaces his treatise with a desire that the law "should be uniform throughout the Dominion, and particularly when it affects persons residing beyond the jurisdiction of the enacting power." And he cites section 94 of the B. N. A. Act, which provides for the assimilation of laws respecting property and civil rights in the English provinces. Though this and many other useful results would follow from the exercise of the powers conferred by

this section, it is safe to predict that the course of political education adopted by local politicians, in which the electorate are taught to regard the Dominion as inimical to all their dearest rights, precludes the possibility of attaining any such result.

The law of each Province is shortly dealt with ; and a very useful table is appended from which it is possible to ascertain at a glance the course of descent and distribution of property in every part of Canada, in almost every possible event.

REVIEW OF EXCHANGES.

Albany Law Journal.—7th November, 1885.

Bequests for Masses, by F. H. McCLOSKEY. After a review of American authorities, the learned writer concludes, "If then a Catholic desire to make provision by will for the saying of masses for his soul there is not the shadow of a doubt but that every Court in the State, if not in the Union, would uphold the bequest if the *mode* of making it were agreeable to the law." The point has been determined in the same way as to personalty in this Province: *Elmsley v. Madden*, 18 Gr. 386.

Ibid.—14th November, 1885.

Common Words and Phrases. Effort; along; beneficial; manufacture; waggon; child: strongly corroborated; device; are defined.

Insurable Interest in Life, by GUY C. H. CORLISS. Concluded in the following number. A wife has an insurable interest in her husband's life, but the husband none in his wife's. In Missouri, it has been held that a policy on the life of a man in favour of his betrothed was valid. In England, a policy on a child's life in favour of the father is void; contra in the States, though a mother has an insurable interest in her child's life. Brothers have no such interest. A creditor has an interest in the life of his debtor, even if he be a minor. A master has been held to have an insurable interest in the life of a skilled servant whom he has employed for a period. Partners have been held to have such interest. The learned writer says that the weight of authority favours the continued validity of a policy though the insurable interest has failed after the creation of the policy.

Ibid.—28th November, 1885.

The Law of Sidewalks, by WILLIAM J. CARR. A number of authorities are cited.

Ibid.—26th December, 1885.

Common Words and Phrases. Merchant or trader; newspaper reports; neighbourhood; fair price; concealed weapons; necessary wearing apparel; are defined.

Extra-territorial Effect of Transfers of Personal Property, by GUY C. H. CORLISS. Concluded in the following number. Many American authorities are cited, and the English law stated.

Ibid.—16th January, 1886.

Common Words and Phrases. Necessity ; produce ; public conveyance ; are defined.

Central Law Journal.—6th November, 1885.

Sulolde—Effect upon a Life Insurance Policy, by CHARLES BURKE ELLIOTT. A number of English and American cases are cited.

Ibid.—13th November, 1885.

Premature Action, by W. W. THORNTON. “ Until there is a breach no action can be maintained ; and usually there can be no breach until the time set for performance has passed. To this general rule, however, there are some exceptions. One of these exceptions is where a refusal to be bound by the terms of the contract is made, or the contract is repudiated in whole or in part ; another, whether the promisor or promisee, or the person who must perform, has voluntarily put it beyond his power to comply with his promise, or to accept from the promisee, or to perform the duty imposed upon him.” A number of authorities are cited under many divisions of the subject.

Ibid.—27th November, 1885.

Libel—Privileged Publications, Legislative and Judicial, by W. L. MURFREY, SR. In Texas, the secret *ex parte* labours of a legislative committee respecting alleged forgeries resulted in a compilation of testimony, which was put into the Attorney-General's hands. A newspaper having published the testimony, its proprietor was held liable in damages at the suit of one charged with forgery. The privileges of judges, jurors, counsel and witnesses are discussed.

Ibid.—11th December 1885.

Deeds—Enuring of after Acquired Title, by JOSEPH A. JOYCE and GEORGE U. WHEELER. Referring to the doctrine of estoppel as affected by registry laws, the learned writers say, “ If the title enures to the grantee under the first deed, it must be by reason of estoppel, and not because the recording of the first deed operates as a notice to the subsequent purchaser of the existence of the prior deed, as this certainly would conflict with the entire spirit of our recording Acts, as construed by the Courts of last resort in the different States. To a Court seeking to do equity as between the parties before it in a case of this character, it would seem that the question would of necessity arise, whether one, under our complete system of registry, can be prejudiced by purchasing that which a search of the records would show had no existence.”

Ibid.—18th December, 1885.

Rights of a Person suffering an Injury when violating the Sunday Law, by W. W. THORNTON. A number of American cases are cited.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[12TH JANUARY, 1886.

SCOTT v. BENEDICT.

Vendor's lien.

The judgment of the Court below, 5 Ont. R. 1.; 4 C. L. T. 407, was affirmed.

The appellant in person.

Walter Barwick for the respondent, Benedict.

BLEAKLEY v. TOWN OF PRESCOTT.

Municipal Corporation—Badly constructed sidewalk—Ice on Sidewalk.

The judgment of the Court below, 7 Ont. R. 261, was reversed.

Watson, for the appellants.

Read, Q.C., and *Walter Read*, for the respondent.

Boyd, C.]

TRAVIS v. TRAVIS.

Donatio mortis causa—Gift inter vivos.

The judgment of the Court below, 8 Ont. R. 516; 5 C. L. T. 224, was affirmed.

McClive, for the appellant.

Muir, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT.]

RICHARDSON v. RANSOM.

Malicious prosecution—Appointment of police magistrates—Constitutional law.

Held, that a person could not be considered a trespasser merely by laying an information charging another with a crime and praying therein that a warrant might be issued for his arrest before a police magistrate appointed by the Ontario Government.

Per Wilson, C.J. The power to appoint police magistrates rests with the Ontario Government.

Dickson, Q.C., for the plaintiff.

Burdett, for the defendant.

Johnson, for the Attorney-General.

WANNAMAKER v. GREEN,

Municipal corporation—46 Vict. cap. 18, sec. 546 (O)—By-law—Uncertainty.

Held, that the notice required to be given by the Municipal Act, 1883, sec. 446 (O), are conditions precedent, the due performance of which is essential to the validity of a by-law passed for the purposes referred to in that section.

Held, also, that a by-law closing a certain road across lot 15, con. 7, of the township of Sidney, when there was more than one road across that lot, was void for uncertainty.

Shepley, for the motion.

Henderson, Q.C., contra.

ROSS v. GRAND TRUNK RAILWAY COMPANY.

Railways—Compensation for land taken—Statute of Limitations.

Held, that the right of compensation for land taken by a railway company is not barred by a less period than twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway having been in possession for ten years.

Meredith, Q.C., for the motion.

Lash, Q.C., contra.

HUBER v. CROOKALL.

Libel—Admissibility of evidence—Nonsuit.

A draft drawn on the plaintiff being presented for acceptance at his place of business by a clerk in the Berlin agency of the Merchants' Bank, answer was returned that the drawee (the plaintiff) was away from home in the Western States, and the clerk so noted the answer on the back of the draft. The defendant, who was manager of the Bank agency added, in his own hand-writing, to what the clerk had written the words "or San Francisco, or the Rocky Mountains," and the draft was therefore returned to the Federal Bank, by whom it had been sent for presentation, and by whom, after its return, it was handed to the private banker who had originally discounted it for the drawers; *inuendo* that the defendant meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud his creditors.

Held, that the words were capable of the libelled meaning alleged, and a nonsuit was therefore set aside and a new trial directed in order to submit to the jury the question whether the words did in fact bear that meaning.

Held. also, on the facts set out below, that there was evidence to go to the jury in support of the *inuendo*.

At the trial the manager of the Federal Bank, to whom the draft was returned, was asked "what did you understand by the words added by defendant?" To this question objection was taken, and the Judge ruled that, in the absence of evidence (which it was admitted would not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put.

Held, that proof of such usage was unnecessary; but, following *Daves v. Hartley*, 3 Ex. 200, that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable; as, however, the Judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered, but without costs.

MILLER v. REED.

Master and servant—Injury to servant—Non-liability of master.

Held, in an action by a servant against his master for injury sustained by the former by reason of a circular saw which he was hired to run not being guarded, that it is not sufficient to show that the master knew that it was not guarded, but it must also be shown that the servant was ignorant of it; and the servant was skilled in the use of the saw, and was hired to run it, it was his duty to see that it was guarded; and he could not, therefore, recover for what was the result of his own neglect.

Dickson, Q.C., for the motion.

Burdett, contra.

GARDNER v. KLOEPFER.

Assignment for creditors—Acceptance of trust by assignee—Right to impeach after acceptance—Damages—Loss of profits—New trial.

M. & M. being in insolvent circumstances, made an assignment for the benefit of their creditors to the plaintiff, the defendant K. and another. The defendant K. accepted the trust and acted in it. Afterwards, being desirous of disputing the validity of the assignment, he recovered judgment against the insolvents, issued execution thereon, and seized certain raw material intended to be worked up into buggies. The plaintiff claimed the goods, and an interpleader issue was directed which resulted in a finding in favour of the plaintiff, the Court having held that the defendants, having once assented to the assignment, could not afterwards impeach it. The plaintiff then brought this action to recover damages for the wrongful seizure and detention of the goods. The jury found a verdict for the plaintiff, but it appeared that the damages awarded were entirely for the loss of profits which it was claimed might have been made by working up into buggies the said material, and by having the buggies ready for sale at a period much earlier than if no seizure had been made.

Held, Wilson, C.J., dissenting, that the damages assessed were too uncertain, speculative and remote to have been legally recovered; but, as the learned Judge excluded damages from the consideration of the jury which might have been legally recovered, a new trial was directed.

Creasor, Q.C., for the plaintiff.

Wallace Nesbitt, for the defendants.

KLOEPFER v. GARDNER.

Insolvency—Disputing assignment—Right to recover dividend.

In an action by a creditor of an insolvent against the assignee under an assignment for the benefit of creditors to recover the amount of the dividend declared upon his claim, the defendant pleaded as a defence that the plaintiff disputing the validity of said assignment had, as an execution creditor of the insolvent, caused the goods assigned to be seized, and, on the trial of an interpleader issue directed, had endeavoured to impeach the assignment; and that, having thus repudiated the assignment, he could not now claim the benefit of it.

Held, O'Connor, J., dissenting, a good defence, and that the plaintiff was not entitled to recover.

It was contended for the plaintiff that the action not having been tried upon the merits, but the Court having held that the plaintiff, being an assenting party to the assignment, was estopped from afterwards impeaching it, formed no bar to the plaintiff's right to rank as a creditor upon the estate of the insolvent.

Per Wilson, C.J. The mere bringing of the action was sufficient repudiation to disentitle the plaintiff from recovering.

Per O'Connor, J. By the judgment of the Court the plaintiff was relegated to his position and status under his assignment, and therefore to the benefit of it.

Creasor, Q.C., for the motion.

W. Nesbitt, contra.

DUNCAN v. TEES.

Interpleader—Jus tertii—Execution creditor as plaintiff.

Held, varying the order of Rose, J., 11 P. R. 667, that the execution creditor was entitled to set up against the claimants the right of the assignee, and an issue was directed, the execution creditors to be plaintiffs.

Aylesworth, for the sheriff.

Akers, for the execution creditors.

Shepley for the claimants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 2ND JANUARY, 1886.]

RYAN v. CANADA SOUTHERN RAILWAY COMPANY.

Railways—Accident—Contributory negligence—Withdrawing case from jury.

On the undisputed facts disclosed in the plaintiff's case, it appeared that there was a switch stand erected in the defendants' yard close to the track; the deceased, who was a brakeman, in the defendants' employment, being aware of its position and proximity to the track. On the day in question, the deceased was engaged as a brakeman on a train passing through the yard. His position of brakeman was on the top of the car, but for some reason which did not appear he was on the side of the car holding on to a ladder, and as his attention was drawn towards the end of the train, he did not see the switch stand, and was thrown under the wheels of the car and killed.

Held, that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and that the case was properly withdrawn from the jury.

Falconbridge, Q.C., for the plaintiff.

Nicol Kingsmill, for the defendants.

HARRIS v. WATERLOO MUTUAL INSURANCE COMPANY.

Insurance—Proof of loss—Fraudulent statement as to amount of loss.

The plaintiff effected an insurance against fire on a building and contents, the amount placed on contents being \$200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated that he had suffered loss on the contents to the amount of \$1665.50, whereas the contents were proved to be worth only \$150.

Held, that this vitiated the whole policy, and its effect was not confined to the property as to which the false statement was made.

Lash, Q.C., for the plaintiff.

Osler, Q.C., and *Bowlby*, for the defendants.

PARDEE v. GLASS.

Trespass—Seizure—Interference with—Notice of action—Goods in custody of the law.

The Bank of Montreal placed an execution against M., plaintiff's son, in the hands of B., a Division Court bailiff, under which B. seized a stallion as belonging to M. The stallion was placed with an innkeeper pending interpleader proceedings instituted on plaintiff's behalf claiming the horse as her property. Subsequently, an execution against the same parties at the suit of P. was placed in the sheriff's hands. P's solicitors informed the sheriff of all the circumstances, and the sheriff on the 3rd October, obtained from the innkeeper a written undertaking to keep the horse stated to be under seizure by the sheriff until further orders from the sheriff; on the 14th October the sheriff was notified of the plaintiff's claim, whereupon at his instance an interpleader order was granted. On 31st December, the Division Court interpleader was decided in the plaintiff's favour, whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before the innkeeper had heard from the sheriff the plaintiff demanded the horse, but the innkeeper refused to deliver it up until his charge for keeping it was paid, but he did not assert any right to hold for the sheriff. On the 18th November, part of the charges were paid, either by the Bank of Montreal or P., and the balance was subsequently paid by B. On 3rd November, an order was made barring P's claim and directing the sheriff to forthwith deliver up the horse to the plaintiff. On 14th November, an action was brought against P., the Bank of Montreal, the sheriff and bailiff for conversion, etc., claiming the value of the horse, damages for loss of earnings, etc. About 3rd December, after the commencement of the action, the horse was tendered to the plaintiff, who refused to accept it except on payment of damages and costs. No notice of action was given.

Held, that there could be no recovery against any of the parties (1) for the reason that the bailiff should have had notice of action; (2) that there was nothing to connect the Bank or P. with the seizure; (3) that, though there was what constituted a seizure by the sheriff so as to entitle him to interplead and to make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with the plaintiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law.

Osler, Q.C., for the plaintiff.

Hardy, Q.C., for the Bank of Montreal.

Falconbridge, Q.C., for the sheriff.

Fitzgerald, for P.

Aylesworth, for the bailiff.

ARSCOTT v. LILLEY.

Magistrate—Action against—Conviction not quashed—Costs—R. S. O. cap. 73, secs. 4, 17—41 Vict. cap. 8 (O)—O. J. Act, sec. 9. sub-sec. 2—Rule 428.

Held, that the 4th section of R. S. O. cap. 73, as amended by 41 Vict. cap. 8 (O), prevents an action being brought for anything done under a conviction, whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force.

Held, also, though doubting, that the 17th section of said Act, which entitles the magistrate to full costs as between solicitor and client where in such action he obtains a verdict in his favour, has been repealed by the O. J. Act, sec. 9, sub-sec. 2, and rule 428; and that such costs are now in the discretion of the Court or Judge.

Osler, Q.C., for the plaintiff.

Hutchinson and Aylesworth, for the defendants.

CULVERWELL v. BIRNEY.

Principal and agent—Sale by agent—Double commission.

An agent selling land may recover commission from his principal, notwithstanding that he has received commission from the purchaser, where the principal has agreed that the agent might receive such commission, or where the principal knows that the agent is seeking and intends to obtain such commission and does not object.

J. K. Kerr, Q.C., for the plaintiff.

Fullerton, for the defendant.

BAKER v. MILLS.

Trespass—Damage to land—Entry by devisee.

The plaintiffs claimed as devisee of S. for damages alleged to have been sustained by them by reason of the cutting and removal of certain timber on land devised by S. to them. Prior to S's death he mortgaged the land to a building society, which, after the alleged trespass, sold the land to the defendant. The land was uncultivated, and there had been no entry by the plaintiffs.

Held, that the action was not maintainable.

Reeve, Q.C., for the plaintiff.

Shepley, contra.

CLEGG v. GRAND TRUNK RAILWAY COMPANY.

Accident—Negligence—44 Vict. cap. 22 (O)—46 Vict. cap. 24 (D)—Statement of claim—Omission of necessary averments.

Action by the plaintiff, as administrator of C., for damages under 44 Vict. cap. 22 (O), by reason of the omission to pack a frog on the Midland Railway, which the defendants were operating.

Held, that the defendants were not liable, that the Midland Railway was a railway connecting with the defendant's railway, and under 46 Vict. cap. 24 (D), was exempt from the operation of the Ontario Act.

Held, also, that by reason of the omission in the statement of claim to state, as required by sub-sec. 2 of sec. 8 of the said Act, and to prove that the defendants knew that the frog was not packed, or that deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof, no recovery could be had.

G. T. Blackstock, for the plaintiff.

Wallace Nesbitt, for the defendants.

ROBERTSON v. DALEY.

Statute of limitations—Possession—Squatter.

In 1809, P., the owner of certain land, sold it to D., who went into possession and occupied till 1827 or 1828, when he was turned out by one Dufait, who was put in possession and remained in possession until 1864, when he conveyed to one D., through whom the defendant claimed. D's actual possession had only been of about ten acres.

Held, that D's possession after 1828, would relate to the whole land, and could not be treated as that of a squatter so as to confer a possessory title only to the ten acres.

Small, for the plaintiff.

Scane, for the defendant.

AUSTIN MINING CO. v. GEMMEL.

Company—Detention of books by secretary—Meeting for election of directors—Whether properly called—Quorum—Pleading.

Action by the plaintiffs, a mining company incorporated under the Canada Joint Stock Company's Act, 40 Vict. cap. 43, by letters patent, against the defendant, who it was alleged had ceased to be secretary of the company, for the conversion and detention of certain books, etc., of

the company. The defendant set up as a defence that he was still secretary of the company, as the board of directors, who had appointed a new secretary had not been legally elected, the meeting for the election not having been duly called, and also that there was not a proper quorum to transact business.

Held, under the circumstances set out in the case, that the meeting was duly called and there was a proper quorum.

Held, also, that the defendant must be deemed to have unlawfully detained the books, etc.; that there was an election *de facto*, and a suit in the company's name, and an officer of the company could not, as against the company, be permitted to withhold what belonged to the company. In any event, trial of the defence set up was not the proper way to test the election of the directors, which should have been by motion to dismiss the action.

The effect of the statute discussed.

R. W. Scott, Q.C., for the plaintiffs.

Chrysler, for the defendant.

PAISLEY v. BRODDY.

Action on foreign judgment—Defence—Covenant—Foreclosure—Concealment—Nudum pactum—Fraud—Matters pleadable in original action.

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant.

Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure; and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign Court was no defence to this action.

Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt showed no defence, but a mere verbal agreement without consideration.

Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of *fi. fa.* against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff in order to sustain the proceedings against the defendant, showed no fraud and was no answer to the action.

Per Wilson, C. J. The defendant is not at liberty to set up in answer to this action, matters which could have been pleaded in the original cause.

Schoff, for the plaintiff.

Tilt, Q.C., and *T. C. Milligan*, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT.]

In re MONTEITH; MERCHANTS' BANK v. MONTEITH.*Administration—Warehouse Receipts—Possession of the goods—Evidence—*
43 Vict. cap. 22, sec. 7 (D).

In administration proceedings in the Master's office, certain unsecured creditors of the deceased sought to make certain other creditors account for the proceeds of certain goods which they claimed to be entitled to under warehouse receipts, by attacking the validity of the warehouse receipts. It appeared by the evidence of H. that he had signed warehouse receipts at the request of M. for goods warehoused in M.'s cellar on which M. had obtained advances, although he (H.) never had possession of the goods. The Master found against the evidence of H., that the warehouse receipts were valid. On appeal from the Master, it was

Held, that H. had acted as a warehouse keeper in issuing the receipts and not as a mere bailee, and that the test of the validity of the warehouse receipts did not necessarily depend upon proving that he was actually, visibly and continuously in the possession of the goods from first to last. The receipts were not void at their inception. M. having disappeared, H. took possession of the goods and allowed the secured creditors to take and sell them, which they had a right to do. The report should therefore not be disturbed.

Quære, as to rights of execution creditors against M. if there had been any before H. took possession of the goods.

Credibility of witnesses and evidence in criminal proceedings commented upon.

Rule of the Court in the administration of assets as laid down in *Wilson v. Paul*, 8 Sim. 63, and *Mitchelson v. Piper*, 8 Sim. 64, referred to.

Per Proudfoot, J. The Act 43 Vict. cap. 22, sec. 7 (D), authorizes persons who are not warehousemen *alone* to give receipts, but such warehouse receipts are comprised in the definition previously given in the statute which requires the goods to be in the actual, visible and continued possession of the bailee.

In re CLEATOR.

Will, construction of—Devise—Estate in fee tail or fee simple—Vendor and Purchaser—R. S. O. cap. 109.

M. C. by her will devised as follows: "Firstly, I give and devise to my grandson, J. C., the farm * * * to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body should he leave any such heirs surviving, and in the event of his leaving no such heirs then the same and every part thereof is to be divided as fairly and equally as may be amongst * * * to have and to hold the same to them their heirs and assigns forever; but my will and devise is that my said grandson J. C. shall not have or go into the possession * * * until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son J. C. \$100 annually during his natural life, the same to be paid to him quarterly * * * and to be a charge on the farm or homestead above devised to his said son John."

Held (reversing the decision of Proudfoot, J.), that the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings in the land by way of conveyance. *Greenwood v. Verdon*, 1 K. & J. 74 distinguished.

Per Proudfoot, J. "Heirs of the body" mean heirs of the body living at the death of J. C. J. C. took only a life estate and his heirs of his body would take as purchasers a fee simple. If at J. C.'s death there were no heirs of his body the estate would go to his then living brothers and sisters in fee simple.

Eden v. Wilson, 4 H. L. C. 257, distinguished.

Beck, for the Vendor.

Beverley Jones, for the Purchaser.

[23RD DECEMBER, 1885.]

HICKEY v. STOVER.

Will—Ambiguity—Extrinsic evidence—Guardianship—Express trust—Statute of Limitations.

A testator devised the south quarter of lot 20 in the 9th concession of the township of Raleigh to T. and the east quarter of the same lot to her two daughters. It was sought to show that the testator had no other land than lot 20 in the 8th concession of Raleigh, and to make the will operate on this.

Held, that the learned Judge who tried the case was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20 in the 8th concession was the only land which the testatrix owned, the will could not operate to pass it.

The devise in the will was in its terms free from all ambiguity. It was not inherently absurd or insensible, nor inconsistent with any context, and there was nothing else in the will which could be brought in to aid in its interpretation. The testatrix owned one thing and devised another, and evidence was not admissible to show that these were identical, or that one meant the other for the purposes of the will, nor was evidence of the intention of the testatrix admissible to explain the will, containing, as it did, no latent ambiguity. To show that the testatrix did not own lot 20 in the 9th concession was no evidence of an intention by her to devise lot 20 in the 8th concession.

Held, also that though a guardian by appointment of the Surrogate Court was an express trustee during the minority of the ward, so that she could not acquire title against him by possession of his lands, yet the guardianship ended and the trust ceased at the ward's majority, and since after that the guardian dealt with the property as her own for some twenty years, she had acquired a good title by possession against her former ward.

James MacLennan, Q.C., and Pegley, for the appeal.

Matthew Wilson, contra.

[BOYD, C., 23RD DECEMBER, 1885.]

CHARTERIS v. CHARTERIS.

Will, construction of—Trust—Discretion—Failure of trustee—Reference to Master to work out a scheme.

A testator having disposed of one-third of the residue of his estate real and personal, devised and bequeathed the remainder to J. C. to hold to him, his heirs, executors and administrators or assigns in trust for the benefit of the testator's two sisters, and with all reasonable expedition to convert the same into money, and apply the same or the proceeds thereof for the benefit of the said two sisters or otherwise distribute the same equally among his said two sisters as he should consider just. And he directed that his other trustees should not enquire or interfere with such distribution as J. C. might choose to make among the said two sisters, except when their concurrence should be necessary for conformity. J. C. predeceased the testator.

Held, that the above was in substance an imperative declaration of a trust of the whole for the equal benefit of the two sisters, with a discretionary power reposed in the trustee as to its mode of execution, and

the Court would undertake to discharge vicariously what could not otherwise be done owing to J. C. having predeceased the testator, by referring it to the Master to ascertain the proper mode of carrying out the directions of the will.

Re Charteris, 25 Gr. 876 commented on.

S. H. Blake, Q.C., for the plaintiff.

C. R. Atkinson, Q.C., for the curator of one sister.

J. MacLennan, Q.C., for the infant defendants.

W. H. P. Clement, for the adult defendants, other than the trustees.

M. Wilson, for the trustees.

[PROUDFOOT, J., 11TH NOVEMBER, 1885.]

RATTE v. BOOTH.

Riparian proprietor—Navigable stream—Reservation in patent.

J. A. was the patentee of a certain water lot on the river Ottawa, and the description covered the lot and two chains distant from the shore, but the patent contained a reservation "of the free use, passage and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found in or under, or be flowing through or upon any part of the said parcel of land hereby granted." J. A. afterwards granted the said water lot to A. R., but the description in the deed only went to the water's edge.

In an action by A. R. against some owners of saw mills on the river above his lot to prevent them from throwing saw dust, slabs, etc., into the river to his detriment in the use of his water lot, it was

Held, that the Ottawa river is a navigable stream in fact, and a riparian proprietor, as such, would therefore only be entitled to the land to the water's edge. The reservation in the patent still leaves that part of the river a navigable stream, and does not convey an exclusive right to the grantee of the Crown, and being such the conveyance to the water's edge, would not carry the right farther than to that edge. It is only by the special grant that a title passed to the two chains, and still left the river with all its characteristics of a navigable stream.

Any structure on the water, even if erected for twenty years, would be an interference with the free use of the river reserved by the Crown, and the right to do so could not be acquired in that way.

Cassels, Q.C., for the plaintiff.

Gormully, for the defendants Bronson and Weston.

McCarthy, Q.C., and *Christie*, for the other defendants.

[FERGUSON, J., 14TH DECEMBER, 1885.]

WICKSTEED v. MUNRO.

*Insurance for benefit of child—Death of child during lifetime of insured—
Right of administratrix to insurance money—R. S. O. cap. 129.*

A. M. M. in 1868 insured his life for the benefit of his daughter, H. M. M., under 27 Vict. cap. 17. H. M. M. married the plaintiff, W., in 1879, and died during her father's lifetime, in 1882, leaving a daughter for whose benefit she bequeathed all her interest in the said policy to her husband, reciting in her will that she had paid the premiums which had been allowed to remain unpaid, and kept the policy up for several years. A. M. M. subsequently in 1877 married the defendant, M. A. M., and died intestate in 1884, leaving her, his widow, and one child by his second marriage, without having made any further disposition of the insurance. In an action by W., as executor of H. M. M., against M. A. M., as administratrix of A. M. M., to try the right to the insurance money, it was

Held, that the insurance money belonged to the estate of the insured, and was payable to the defendant M. A. M., as administratrix thereof.

MacLennan, Q.C., for the defendant.

Miller, Q.C., for the defendant.

[16TH DECEMBER, 1885.]

DEMOREST v. THE GRAND JUNCTION R. W. CO.

Arbitration—Compensation for land taken for R. W. Co.—Issue—Pleadings.

D. brought an action to compel a R. W. Co. to arbitrate to ascertain the value of certain land taken for the purposes of the R. W. Co., and after the issue of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators but was subsequently set aside by the Court as invalid. D. then proceeded with his action, and the R. W. Co. pleaded that the arbitrators fixed a time for the making of the award, but did not make any within the time limited and did not enlarge the time and that therefore the sum of \$400 offered by the R. W. Co. before proceedings taken was the correct amount of the compensation. The learned Judge found on the evidence that no time had been fixed, and that this was a different case from one in which the time had been fixed but no award had been made within the fixed time, and

Held, that as the parties by these pleadings placed themselves upon an issue as to whether the arbitrators had fixed a time or not ; and as that issue was found in favour of the plaintiff the sum of \$400 offered had not become the compensation to be paid, and a reference back was ordered.

Cassels, Q.C. and Skinner, for the plaintiff.

Bell, Q.C., and W. H. Biggar, for the defendants.

IN CHAMBERS.

[BOYD, C., 7TH JANUARY, 1886.]

DAWSON v. MOFFATT.

*Stop Order—Execution creditors—Priorities—Creditors Relief Act, 1880—
Rateable distribution of fund in Court.*

In the case of judgment or execution creditors, priority of payment out of a fund in Court arrested by stop orders, was formerly determined by the chronological sequence in which the orders were obtained, and that mode of determining priorities is to be accounted for in this Province on the ground that such was the order of payment of executions at law, and equity, aiding the law, conformed to the legal order of administering the fund ; but as this principle of priority of and among execution creditors has been abolished by the Creditors' Relief Act, 1880, it is no longer reasonable or seemly to preserve the analagous system of priorities in awarding equitable execution as the outcome of stop orders ; and therefore execution creditors who had lodged stop orders between the date when the Creditors' Relief Act, 1880, came into force and the date of the order for payment out, were *held* entitled to share ratably in this fund.

J. H. Ferguson, Shepley, T. P. Galt, G. F. Ruttan, and Howland, Arnoldi and Ryerson, for the different creditors.

CRANE v. CRAIG.

Infants allowance—Past maintenance—Encroaching on principal.

Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encroached upon, unless for unavoidable reasons, falling little short of necessity ;

and the Court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor.

Where the amount of five infants' estate was \$11,250, the Master allowed their mother \$9,594 for five years past maintenance, but on appeal the amount was reduced to \$6,600.

J. Hoskin, Q.C., for the appeal.

George Morphy, contra.

[11TH JANUARY, 1886.]

STARK v. FISHER.

Taxation of costs—Local Officer—Appeal—Rule 427.

Appeals from taxations by local officers should, by analogy to appeals from orders, be governed by Rule 427, and an appeal which was not brought on within eight days from the certificate of the local officer, was struck out with costs.

Holman, for the appeal.

Hoyles, contra.

[13TH JANUARY, 1886.]

SMITH v. GREEY.

Foreign commission—Evidence—Restricting solicitor's use of knowledge of evidence acquired on opening commission.

Held, that the Court in allowing a foreign commission to be opened before the trial could not impose upon the parties restrictions as to the use to be made of the knowledge of the evidence which would then be acquired by the solicitors.

Arnoldi, for the plaintiffs.

H. D. Gamble, for the defendants.

[18TH JANUARY, 1886.]

COTTINGHAM v. COTTINGHAM.

Fund in Court—Assignment—Notice to Accountant—Stop Order—Judgment—Payment out.

The proper practice when money in Court has been assigned is to get an order to pay the assignee only, or not to pay to the assignor without notice to the assignee.

Mere notice to the accountant of an assignment of the fund is of no avail against a stop order afterwards obtained by another assignee under a prior assignment.

An assignee of a fund in Court has a right to apply for a stop order by virtue of his assignment without any judgment in his favour.

The lodging of an assignment and power of attorney with the accountant is sufficient under the practice to justify payment out in the absence of any other claim.

Watson, for the claimant, Hudspeth.

Small, for the claimant, Hargreaves.

MASTER'S OFFICE.

[29TH APRIL, 1885.]

In re THE QUEEN CITY REFINING CO.

Winding up proceedings—45 Vict. cap. 23 (D)—Jurisdiction to make call upon contributories—Delegated or Statutory Jurisdiction—Assignment by Company before liquidation of right to make call—Effect of.

Shortly after the list of contributories had been settled under the order of reference in this case, which was in the usual form, the liquidator of the insolvent company obtained a summons from the Master in Ordinary, to whom the reference was directed, for a call upon the contributories of the full balance unpaid upon the shares respectively held by them. Upon return of the summons, objection was taken, on behalf of the contributories, to the Master's jurisdiction to make the call, and evidence was put in proving that, prior to the insolvency of the company, an assignment had, pursuant to a resolution of the directors been duly executed under the seal of the company, conveying to certain parties the entire balance due and unpaid upon the stock of the company.

THE MASTER IN ORDINARY.—After issuing a certificate under the order of reference finding a number of shareholders to be contributories to the above company, the liquidator applied to me under the statutory jurisdiction vested in me by the Act of 1884, for a summons making a call upon the contributories for the balance of their unpaid shares.

On the return of the summons, counsel for the contributories contended that, as I was acting under the delegated jurisdiction conferred upon me by the order of reference, I could not exercise the statutory jurisdiction vested in me by the Act 47 Vict. cap. 39, sec. 5 (D).

The contention is not well founded. Though acting as the delegate of the Court under the order, I find nothing in the Act or the order restricting or suspending the jurisdiction vested in me by the statute. I take the rule to be that, where a Court or judicial officer lawfully possesses a statutory jurisdiction in the administration of justice, another or special jurisdiction conferred by some independent authority will not oust or suspend the exercise of such statutory jurisdiction. And, until some appellate tribunal decides otherwise, I think it will be proper, in the spirit of the maxim *ampliare justitiam*, to administer the jurisdiction defined and marked out by the provisions of the Act.

But evidence which was not before me under the order of reference has been put in on this summons which affects the legal right of the liquidator to sue for these unpaid shares.

It has been proved that on the 18th October, the above company, by an instrument under its corporate seal, assigned to three individuals trading under the name of Eccles, Thoms & Co., "the amounts still unpaid upon all the respective subscriptions to the capital stock of the said company, both those now overdue, and those yet to become due under the call made upon the said stock," with full power "to ask, demand, sue for and recover, and receive, and to give effectual receipts and discharges for the same, either in their own names or in the name of the company."

A further document has been put in whereby Eccles, Thoms & Co. as a firm assign to the Third National Bank of Baltimore, "all rights" held by them under an indenture executed by the above company on the 18th October, 1882, without any fuller identification of the "rights" or of the indenture intended to be assigned.

The statute 45 Vict. cap. 23 (D), under which this winding up proceeding is taken, directs the liquidator upon his appointment to take into his custody, and under his control, all the property, effects, and choses in action "to which the company is entitled." It defines a contributory to mean a person liable to contribute to the assets of the company; and it authorizes the Court, when it has ascertained the sufficiency of the assets of the company, to make calls and order payment thereof by all or any of the contributories, to satisfy the debts and liabilities of the company.

At the time the liquidator was appointed, the company was not entitled to these unpaid shares. Its title to, and right of action in them as assets, or choses in action had passed out of the company, and had rightly or wrongly become vested in Eccles, Thoms & Co., who subsequently purported to assign (if they did in law assign) certain undefined "rights" to the Third National Bank of Baltimore.

The assignment being by way of a security, the beneficial interest of Eccles, Thoms & Co., or of their assignee, in these unpaid shares would be enforceable under the ordinary equity procedure by an action to which the company or its liquidator, and Eccles, Thoms & Co. or their assignee would be necessary parties: *Calvert on Parties*, 314.

That equity procedure is not applicable, nor is ordinary equity remedy in respect of such right of action enforceable here. And therefore it is not necessary in this proceeding to consider whether the statutory provisions relating to choses in action, R. S. O. cap. 116, ss. 6-11, and the section (17 s-s. 60), and rules of the O. J. Act (rule 102 and G. O. Chy. 58, rule 7), apply to the present assignment.

During the argument on the summons, counsel for the Third National Bank appeared before me, and, while claiming the benefit of the assignment, offered to give an undertaking to ratify and be bound by all that had been done by the liquidator in these proceedings against the shareholders.

This, if sanctioned, would enable a creditor who had obtained an assignment of all the insolvent company's claims against its shareholders, to assert his personal right of action under cover of the name of the official liquidator, and, under the summary process which this Insolvent Act authorizes, compel payment of such special security for his own debt without incurring any liability whatever, and at the cost of the estate.

The assignment having been executed before these proceedings, the liquidator has no title or right of action in these unpaid shares; and I take it he would be abusing the process of the Court and evading the obvious intention of the Act for the exclusive benefit of a favoured creditor, in suing parties against whom he had no right of action under the statute, and to whom he could give no effectual discharge for any moneys he might collect from them. The assent of this creditor is doubtless offered so as to enable him, through the summary powers created by the Insolvent Act, to secure his claim out of the shareholders; and that by way of preferential payment as between himself and the other creditors of the company, while the very object and meaning of the Act was to prevent any such preference being obtainable: *Re Traders, etc.*, L. R. 19 Eq. 60.

Not only is there no provision in the Act for the concurrence of such creditors in enforcing their preferential claims in the name of the liquidator, but an analgous case is against their right.

Where the double proceedings in bankruptcy and under the winding up Act of 1848 were allowable, Lord Westbury held that a creditors' assignee in bankruptcy had no authority to concur with the official manager (now liquidator) in or about the winding up of an insolvent company: *Re London Banking Corporation*, 4 Jur. N. S. 743.

An assignment of securities made by a company prior to its winding up ousts the claim of the liquidator. Thus, where certain title deeds had been deposited with a bank as security for discounts obtained by a company, and the bank sold and realized more than enough to pay off

such discounts, it was held that, as against the liquidator, the bank was entitled to hold the balance in satisfaction of their general account: *Ex parte National Bank*, L. R. 14 Eq. 507.

And such an assignment will operate to transfer all such claims as *choses in action*, even although alleged to be improvidently made: *Re Parkgate Waggon Co.*, L. R. 17 Ch. D. 284.

The object of this Insolvent Act is to create a common fund which is to be the source of the payment of every creditor. The liability of the contributories is a liability not to make payments to the creditors, but to contribute to and make good what should be the proper amount of the common fund for the payment of all liabilities of the insolvent company: *Webb v. Whiffen*, L. R. 5. H. L. 711. And this liability to contribution is to be enforced by the liquidator according to the provisions of the Act: *Re Waterhouse*, L. R. 9 Ch. D. 600.

Then, having got into that common fund every sum which ought to be contributed to it by the contributories and others liable to the company, the Court takes possession of that fund, and distributes it amongst all the creditors of the company *pari passu*, and will, as far as possible, not give any preference or priority between the various creditors—at the same time respecting the rights of those who have valid and independent rights as secured creditors of the company: *Re Brown*, L. R. 18 Ch. D. 469.

New rights of action are created and new liabilities are imposed by the Act which did not exist prior to its passing, and which can only be enforced according to its provisions and by the procedure it prescribes: *National Funds Assurance Co.*, L. R. 10 Ch. D. 125; *Burgess' Case*, L. R. 15 Ch. D. 507.

And the Court has no power over the assets, or such rights of action and liabilities, except as defined by the statute: *Re Hull Drapery Co.*, L. R. 15 Ch. D. 329.

And, as the whole assets of the company are to be applied *pari passu* in payment of all creditors, it is evidently intended that the liquidator is not to pay some only of the creditors in order that others who may have particular claims on particular shareholders, may obtain a larger amount from those shareholders: *Morris' case*, L. R. 7 Ch. 204.

I express no opinion on the validity of this assignment, either under R. S. O. cap. 250, sec. 30, s-s. 2, or ss. 71-64 of this Act. It will be for the liquidator and the other creditors to consider how far it is binding on them. It appears to me to show that no right of action vested in the liquidator to enforce against the shareholders of this company payment of the amounts due by them in respect of their shares in the summary manner provided by the Act.

I say nothing as to whether my certificate should have been confirmed before moving.

The summons must therefore be dismissed, and with costs to be paid by the liquidator, for after becoming aware of this assignment, and after

a warning from the counsel for the shareholders, he continued to claim against them a right of action which I find never vested in him under the Act.

G. W. Meyer, for the liquidator.

Foster, Q.C., Falconbridge, Q.C., and Wm. Seton Gordon, for the contributories.

A. H. Marsh, for the Third National Bank.

NEW BRUNSWICK.

In the Supreme Court.

HAZEN v. TOWN OF PORTLAND.

Power of Attorney—Authority to convey land for money consideration—Conveyance by agent for other consideration—Whether Void—Ratification.

Where a power of attorney authorizes an agent to do a particular act, and this is followed by general words, those general words are not to be extended beyond what is necessary for doing the particular act.

A. and B., tenants in common of land, residing abroad, executed powers of attorney authorizing the sale of their interests for such sums of money as their respective agents should think reasonable. The defendants, wishing to open a street through the land, applied to the agents, who conveyed to them by deed of gift, the piece of land required, believing that the opening of the street would increase the value of the adjoining land of their principals. After this, partition was made between A. and B., by mutual deeds of release, and the land through which the proposed street was to be laid out became the sole property of A., and in the deed thereof executed by B. to A., and on a plan annexed thereto, the land released to A. was described as bounded by the proposed street. A similar plan was annexed to the deed given by A. to B. The defendants afterwards entered on the land and opened the street, for which A. brought trespass.

Held, (i) That A.'s agent had exceeded his authority in conveying the land to the defendants, without any pecuniary consideration, and that no title passed by the deed. (ii) That A. had not ratified the deed by accepting the conveyance from B. describing the land as bounded by the street, because (a) it did not appear that when A. accepted the deed from B. she knew that her agent had exceeded his

authority in conveying the land to the defendants; and (b) because the reference to the line of the street in the deed from B. was not the act of A., and the acceptance of the deed conveying B.'s interest in a part only of the land, did not preclude A. from relying on her original title to the whole lot.

RUSSELL v. BISHOP.

New trial—Verdict against weight of evidence.

In an action by the indorsee against the maker of a promissory note, there was positive evidence for the plaintiff that the defendant had signed the note. Defendant admitted that he gave a note for the price of certain goods which were to be sent to him for sale according to a written agreement, which note agreed in date, amount, and time and place of payment with the note sued on; but he denied that the payee was the same, and said he did not think the signature to the note was his writing, and thought he could swear it was not the note he had signed. A verdict having been found for the defendant,

Held, per Allen, C.J., Palmer and King, JJ., that the verdict was wholly at variance with any reasonable view of the evidence, and that there should be a new trial.

Per Weldon, Wetmore and Fraser, JJ., that it was a question for the jury whether the defendant signed the note or not; and that the verdict ought not to be set aside.

MICHEAU v. FINNIGAN.

Trespass—Notice of Action—Act done in pursuance of Statute—Schools Act—Consol. Stat. Cap. 65.

In an action for seizing plaintiff's property under an execution issued for school rates, the defendant is entitled to notice of action under the Consol. Stat. cap. 65, sec. 81, if he, acting as Secretary of Schools, honestly believed that the plaintiff was liable to pay the tax, and that in issuing the execution, he (defendant) was discharging his duty under the law; and there are facts existing which might give rise to such belief.

The words in sec. 81, "anything done by virtue of the office of Secretary," mean, any thing done by the defendant in the reasonable belief that he was pursuing the directions of the Act; even though the validity of his appointment as Secretary was doubtful.

RUSSELL v. LEGERE.

New trial—Verdict against weight of evidence.

In an action by indorsee against the maker of a promissory note, in which the making of the note was denied ; after evidence given of defendant's handwriting, he denied the making of the note, and a witness, who was present when it was alleged to have been given, and when an agreement was made between the defendant and the payee about certain goods which were to be sent to the defendant for sale, swore that nothing was said about a note at that time and that none was then given. The plaintiff, in reply, gave evidence that the defendant signed the note at that time, and that he also signed an agreement respecting the goods to be sent, in which it was stated that he had given a note for the price of them, corresponding in date, amount and time of payment, with the note in suit ; and also, that in answer to a letter from the plaintiff demanding payment of the note, and he refused to pay it because he had not received the goods according to the agreement. A verdict being found for the defendant,

Held, per Allen, C.J., Palmer and King, JJ., (Weldon, Wetmore and Fraser, JJ., contra) that the verdict was against the weight of evidence as to the making of the note, and that there ought to be a new trial.

ARMSTRONG v. BOTSFORD.

Judgment creditor—Transfer of property—Consideration—Account between debtor and claimant—Evidence of date of transfer.

In an action against a Sheriff for seizing under an execution against B., property which the plaintiff claimed under a prior purchase from B., but which the judgment creditor alleged was made without consideration, and to defraud B.'s creditors ; an account between the plaintiff and B. in the handwriting of B. and dated at the time of the alleged transfer, in which the plaintiff was debited with the property and credited with payments on account, is evidence for the plaintiff that the account was made at the time it bears date, without any other proof of that fact.

Wetmore, J., dissenting.

Ex parte McQUARRIE.

Review from Justices' Court—Entitling of affidavit—Surplusage—Commissioner before whom sworn describing himself as a "commissioner, etc., Supreme Court"—Whether sufficient—Marksman—Where affidavit made by—Jurat—What should contain.

An affidavit to obtain an order for review of a Magistrate's judgment should not be entitled in any Court: but if entitled in a County Court, when the application is made to a Judge in that Court, it may be treated as surplusage.

If, in an affidavit so entitled, the Commissioner before whom it is sworn describes himself as "a Commissioner, etc., Supreme Court,"

Held, per Wetmore and Fraser, JJ. (King, J., dissenting), that as the affidavit was not properly entitled in the County Court, it could not be intended that the words, "commissioner, etc.," meant a Commissioner for taking affidavits.

If the jurat of an affidavit made by a marksman states that it was read over to the defendant by the commissioner, it will be presumed that it was so read before being sworn.

THE CANADIAN LAW TIMES.

VOL. VI.

MARCH, 1886.

No. 8

SOLICITOR AND CLIENT—AGENCY.

THE law regulating the rights and liabilities of solicitors and their clients, in respect of moneys coming into the custody or control of the former, though elucidated in a long list of cases, is to the public generally, who seem to imagine that common sense is common law, literally an unknown quantity; and if practice is any indication of their knowledge the profession at large seems not to be over familiar with it.

It is intended in this article to review, first, the decisions touching the rights, liabilities and remedies of clients in respect of moneys misappropriated or lost through the misconduct or neglect of solicitors; and secondly, the responsibility of members of a firm of solicitors for the acts or neglect of the individual partners.

No one can become the agent of another person except by the will of that other. Here is a concise, yet complete, statement of the ground-work of the law of agency, laid down by Story.

This proposition is not at variance with the doctrine that, where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act in that behalf; then unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed.

Another proposition to be kept constantly in mind is, that the burthen of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal.

The above statements relating to the law of agency are taken from an elaborate judgment of Lord Cranworth, constantly referred to and always approved (a).

A solicitor employed to collect a debt by the ordinary process of the Courts is by virtue of that employment the agent of his client, either before or after action commenced, to receive the amount of the claim, so that payment to him works a satisfaction of the debt and a discharge of the debtor (b).

It is not intended in this article to discuss the law of solicitor and litigant. What is here said will refer solely to non-contentious business.

We may first consider the position of a debtor who pays money to a solicitor for the use of his creditor. Of course, if the solicitor has direct authority to receive the money the creditor must suffer the loss if any. Production of the obligor's bond is a sufficient manifestation of agency to justify payment to a solicitor of the debt thereby secured (c). And the reason given is that an agent to receive a debt must be empowered to place the debtor in the position occupied by him before the liability was incurred. Having the bond in his possession he can deliver it up, and once the bond is returned and the debt paid, nothing remains to be done; so that having by his act clothed the solicitor with the requirements of agency, the creditor is estopped from denying its existence to the prejudice of the debtor. It was formerly urged that the same rule applied to the custodians of mortgages; and the exponents of the argument endeavoured to establish their proposition by a reference to the early cases deciding that a scrivener entrusted with the security was empowered to receive the

(a) *Pole v. Leash*, 9 Jur. N. S. 829.

(b) *Moody v. Tyrrell*, 6 P. R. 312.

(c) *Wilkinson v. Candlish*, 5 Ex. 93.

money and discharge the debtor; but their swords were turned against themselves, as these very cases lay down a different rule in respect to mortgages (*d*).

The authority of a scrivener sufficiently appears from *Willock v. Waltham* (*e*). There “the interest of the mortgage was paid to and received by the scrivener that put out the money; the scrivener proved insolvent; the question was who should pay the loss. And it was admitted in this case, first, that if the scrivener be entrusted with the custody of *the bond* he may receive the interest, and though he fails, yet the mortgagee shall bear the loss; and that so it is also in such case if he receive the principal and deliver up the bond; for, being entrusted with the security itself it shall be presumed that he is entrusted with the power over it, and with a power to receive the principal and interest; and the rather because the giving up of the bond upon the payment of the money is a discharge thereof; otherwise if the obligee take away the bond, for then he hath no authority to receive the money.

“Secondly, if the scrivener be entrusted with the mortgage deed, not the bond, he hath only authority to receive the interest, but not the principal; because the giving up of the deed is not sufficient to restore the estate, but there must be a re-conveyance, whereas the giving up of the bond is in law an extinguishment of the debt.”

During the argument of *Wilkinson v. Candlish* (*f*), Rolfe, B., is reported as having said that this case was perfectly good law; “but the decision arose out of a profession which does not now exist,* the functions of a scrivener having in modern times been divided into that of a banker and an attorney. In former times money was left in the hands of a scrivener who laid it out at interest, and probably never consulted his client about it.” And Parke, B., at p. 96, said, “A scrivener’s business was to receive other men’s

(*d*) *Wolstenholm v. Davies*, 2 Freem. 289.

(*e*) 1 Salk. 157.

(*f*) *Supra*.

* Boswell says Jack Ellis was the last of the scriveners.

money and lay it out at interest, and then to receive it back again and keep it in his hands, and then to lay it out again at interest. So that the fact of entrusting a security for money in the hands of such a person was evidence of authority to receive the principal money."

The analogy between the professions of a solicitor and a scrivener extends only to the first investment of the money, for there the agency of the solicitor ends, and thereafter he has no more control over the funds by virtue of his calling than has the veriest stranger, and any interference of his with the security is without the scope of his authority and as a consequence is not binding on his client.

Few men will hand over money to a person pretending agency who refuses a receipt; yet the law reports furnish the sad story of hundreds who have unhesitatingly paid it to those who neither had power to free them from their debt nor offered to re-convey their lands. In a case already referred to (*g*), the plaintiff lent £1,000 to the defendant upon the security of an indenture which contained a covenant by the defendant to surrender certain copyholds to the plaintiff's use. No surrender was made. Davison, who was attorney for both parties, signed a receipt for the money, and the title deeds were delivered to him. He prepared and delivered to the defendant, but without the plaintiff's knowledge, a schedule of the deeds received, with an undertaking to return them on payment to *him* of the money and interest. The mortgage remained in D.'s possession, who from time to time received the interest and paid it over. The principal money was paid to D., who appropriated it and died insolvent. The plaintiff had a verdict because the undertaking of D. could not bind his client who knew nothing of it, the indenture could not be cancelled, and it was necessary that the lender should release the covenant to surrender. D. was not entrusted with control over the money; his business was to find an investment, and in taking the money back he was the agent of the borrower to pay, and not of the lender to

(*g*) *Wilkinson v. Candlish*, 5 Ex. 90.

receive it. Though it was proved in this case that the attorney had authority to receive the interest, yet that was not considered evidence of agency to accept the principal; for one might trust another to receive a small sum though he would not a larger amount.

In another case (*h*), the solicitor and legal adviser who collected the interest on a mortgage, though he had not the possession of the mortgage, wrote the mortgagor that he was instructed to call in the investment. The defendant being unable to pay off the mortgage borrowed the amount on another mortgage from the funds of another client in the hands of the solicitor, with which the solicitor was to liquidate the plaintiff's claim. The solicitor not having done so, the plaintiff brought this action to enforce his mortgage, denying the authority of the solicitor, and it was decided that being the attorney and legal adviser of the plaintiff with power to collect the interest was no evidence of agency to receive the principal.

A solicitor (*i*), in whose office the mortgage was left, received from the mortgagor the interest and, unknown to the mortgagee, \$3,000 of the principal, and paid over the interest, but appropriated the \$3,000. He accounted to his client for other sums of interest and for \$1,500 which was afterwards paid to him on account of the principal. The mortgagor had to make good the loss, the Chancellor holding that neither authority to receive the interest nor adoption of the second payment of principal was evidence of ratification of prior unknown payments.

The solicitor was the agent of the mortgagor *to pay over* the money, and was responsible to him alone.

One Defur (*j*) collected rents and occasionally made investments for a lady living abroad. One of his investments was on an annuity. He kept possession of the deed, which provided that the grantor could discharge his liability on giving certain notice and paying £208 and a half-year's

(*h*) *Palmer v. Winstanley*, 23 C. P. 586.

(*i*) *Gillen v. R. C. Epis. Corp. of Kingston*, 7 Ont. R. 146.

(*j*) *Webber v. Grenville*, 7 Jur. N. S. 420.

annuity. Defur always received the payments, and the grantor, wishing to pay off the annuity, applied to Defur, who waived notice, accepted the moneys, and absconded. There was a verdict for the defendant. The Court found that Defur was the general agent to receive and invest money for the plaintiff. It was strenuously argued that Defur had no authority to waive notice; but Erle, C.J., said that it would lead to extreme inconvenience if the principle were adopted that if a person were living abroad and leaving the management of his concerns here to an attorney, the attorney could not exercise discretion of this kind.

From this it would appear that general convenience was the reason for this decision; for the facts reported certainly do not very clearly disclose either a general agency or power to waive notice.

In all other cases of this class, where the defendant has been excused, he has established the agency of the person to whom he paid the money (*k*).

It were useless to multiply examples on this branch of the subject, as they all are governed solely by the principles recognized in those already given, and rest on the same foundation. The most important are collected and reviewed in two recent cases—one in England, the other in Ontario (*l*).

Nor has a solicitor any implied authority from the mere possession of the mortgage to receive interest as agent of the mortgagee. In former times the custody of the mortgage clothed a scrivener with power to receive interest, and his receipt was a discharge to the mortgagor. But as has already been shewn the business of a scrivener was to collect money wherein it differs from that of a solicitor (*m*).

The solicitor or agent of a vendor cannot without special authority receive and give a discharge for the purchase

(*k*) *Palmer v. Winstanley*, 23 C. P. 586, where they are explained.

(*l*) *Gillen v. R. C. Epis. Corp. of Kingston*, 7 Ont. R. 146; *Gordon v. James*, 80 Chy. Div. 257.

(*m*) *Wilkinson v. Candlish*, 5 Ex. 92; *Sims v. Brutton*, Ibid. 609; *Kay v. Brett*, Ibid. 273; *Gillen v. R. C. Epis. Corp. of Kingston*, 7 Ont. R. 147.

money (*n*). The purchaser therefore should insist on the money being paid personally or on the production by the solicitor of a written authority from the vendor to receive it. The production of the deed duly executed with a receipt endorsed is not sufficient warrant for such payment (*o*). The endorsed receipt is no conclusive evidence of payment (*p*).

“It seems, however, that in this country, if a deed of conveyance distinctly states in the operative part that the consideration money has been received, and the estoppel is properly pleaded, the fact of payment and the amount paid, are conclusively presumed” (*q*).

It has been shown that in an ordinary transaction a purchaser is safe in paying money to the vendor's solicitor where he produces a written authority to receive it, but such is not under ordinary circumstances the case where the vendors are trustees.

In every case the purchaser should consider the question, Has the vendor power to authorize the solicitor? If he has and does, well and good; but as a general rule and under ordinary circumstances, trustees have no power to delegate their authority to a solicitor. Their duty obliges them to act with care, and as reasonably careful men would in the conduct of their own affairs. A solicitor, as such, has no authority to receive purchase money, and in the usual course of business he does not do so (*r*).

“When, according to the ordinary course of business, it is necessary for trustees to employ an agent, having from the nature of his employment power to receive money, as a stockbroker employed to invest funds, the trustees are not

(*n*) Sug. 667; *Re Fryer*, 3 K. & J. 317.

(*o*) *Viney v. Chaplin*, 4 Jur. N. S. 667; *Myles v. Thompson*, 23 U. C. R. 553; *Greenwood v. Com. Bank*, 4 Gr. 42.

(*p*) *Shaeton v. Rastall*, 2 T. R. 366; *Winter v. Anson*, 3 Russ. 488; *Hawkins v. Gardner*, 2 Sm. & G. 441.

(*q*) *Taylor on Ev.* 7th Ed. sec. 97, and cases there cited.

(*r*) *Viney v. Chaplin*, 2 De G. & J. 468.

committing a breach of trust in employing such an agent, nor are they answerable for his misapplication of the money (s).

No invariable rule can be deduced on this subject. Circumstances may justify the payment to a solicitor, as where the trustee is abroad ; but each case is governed by the surrounding facts. The cautious or prudent purchaser from a trustee will not pay over the money to a solicitor, however satisfied he may be that the trustee has given authority to the solicitor to receive payment, but will make a practice to insist on payment to the trustees themselves or pay the money into their joint account in a bank designated by them.

But if the trustees show it is manifestly unreasonable to pursue this course under the particular circumstances, he may safely pay it to their authorized solicitor. If he be guided by any other rule he may find himself involved in litigation arising out of breach of trust (t).

"When one, by his words or conduct, *wilfully* causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time " (u).

By "wilfully" in this rule must be understood not that the person represents as true what he knows to be untrue, but only that he *means* his representation to be acted upon and it is acted upon accordingly. For, whatever a man's real intention may be, if he so conducts himself that a reasonable man would take his representation to be true, and believe that it was meant that he should act upon it, and does act upon it as true, that man will be equally precluded from contesting its truth (v).

(s) *In re Bellamy and Metropolitan Board of Works*, 24 Chy. Div. 401, citing *Speight v. Gaunt*, 22 Chy. Div. 727.

(t) *In re Bellamy and Metropolitan Board of Works*, 24 Chy. Div. 400.

(u) *Pickard v. Sears*, 6 A. & E. 469, 474; *Cooke v. Freeman*, 2 Ex. 654, 663.

(v) *Freeman v. Cooke*, *supra*.

Agency by estoppel is in fact no agency at all, for agency is founded *on contract of the parties*; but estoppel admits the absence of contract, and depends on the maxim that where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed on.

In a late case (*w*), the plaintiffs held a mortgage in trust on the property of one Saunders. They were in the habit of trusting Messrs. Dodge & Phipps, solicitors, and these solicitors held the mortgage and all the deeds connected with this property. They, without the knowledge of the plaintiffs, wrote in June, 1878, to the defendant, another client, saying they had a security upon which £1,000 could be invested, meaning the plaintiff's security. The defendant having examined the property, gave the solicitors £1,000 and took their receipt. Dodge & Phipps then wrote to the plaintiffs, enclosing a deed of transfer of the Saunders mortgage for them to sign, saying it was one of Henderson's (the *cestui qui trust*) about to be paid off. The plaintiffs having, without reading it, signed the deed, which contained a release of £1,000, and the endorsed receipt for that amount, returned it to the solicitors. This deed, with the other documents, was duly delivered to Mr. James by Dodge & Phipps, who became bankrupt five years later. Then the plaintiffs, who had received interest regularly, but never received the £1,000, discovered that the solicitor had appropriated it.

The plaintiffs claimed that they, as unpaid vendors, had an equity entitling them to payment from defendant. But the defendant contended that he having first paid his money to the solicitor, and afterwards the plaintiffs having chosen to give a deed to the solicitors, with a receipt endorsed as above described, had induced him to believe that they had, when they executed the deed, received the purchase money, and the loss having been occasioned by their neglect, should be borne by them. The Court of Appeal decided in his favour, holding that his equity was

(*w*) *Gordon v. James*, 30 Chy. Div. 257.

as great as that of the unpaid vendors, and the equities being equal, the holder of the legal estate must succeed.

N. & Y. mortgagees, assigned to the plaintiff, who gave no notice to the mortgagors (x.) Afterwards the mortgagors thinking that N. & Y. were still the holders of the mortgage, paid the money to their solicitors without ascertaining the extent of their authority; the solicitors misappropriated the money, and N. & Y. at their request executed a deed without knowing its purport, containing a recital acknowledging the receipt of the money, and purporting to convey the property to the mortgagors' nominees. The distinction between this and the last case is that the mortgagees had really received their money though from another person; they therefor told the truth in the recital.

The mortgagors defended on the ground that they had received no notice of the assignment, that they had paid their money to the solicitors of the mortgagors who gave them a deed acknowledging its receipt by the mortgagees and that payment to a mortgagee without notice is good even when the mortgage has been assigned. But the court held that the laches of the defendants were greater than those of the plaintiff, as the solicitors were not authorized to receive payment, and had the defendants gone to their original creditors they would have been apprised of the true state of the case.

To turn now to the consideration of the responsibility of the members of a firm of solicitors for the acts or neglect of the individual partners. It often occurs that ostensible members of a firm are simply salaried clerks.

In order to render apparent partners liable for the acts of each other the legal relation must exist between them.

A person who is not a partner as between the proprietor and himself, is not so to third persons, though the latter may have been told by the proprietor that he is, and though he may have performed what are ordinarily the functions of a partner and may have told others that he is

(x) *Kent v. Thomas*, 1 H. & N. 472.

one, they not having communicated the same to the person who seeks to make him responsible (y).

At first blush it would seem that where a man proclaims himself to the world as a member of a firm he would be estopped from denying his responsibility for the firms acts, on the ground that such declaration had not come to the ears of the person seeking indemnity from him. But such person never having heard it cannot have been influenced by the statement, nor have suffered anything thereby, and further, estoppel in general applies only as between parties and their privies and cannot be taken advantage of by strangers (z.)

A firm is answerable for fraudulent misapplication of funds committed by one of the partners, when in the course of the firm's business and in the scope of his usual authority, though no benefit be derived therefrom by the other partners. It follows, therefore, that the firm is not liable for any such misappropriation when it is outside of the course of their business.

The receipt of clients' money for investment on a specified security, is within the scope of the business as a firm of solicitors.

A. and B. having for many years carried on business in partnership as solicitors dissolved in 1834; B. continued the business till he failed in 1841. It was then discovered that a sum of money had been paid to the general account of the firm for investment. B. appropriated the money but entered it in the firm books and paid interest, representing to the client that he had invested it. It was decided that A. must make good the amount notwithstanding he had received no benefit, and was ignorant of the transaction as it was a dealing within the scope of a partnership business.

His liability is not founded on fraud but on his implied contract of guaranty that his client's interest shall not be injured by the *partnership* action of his partner.

(y) *Edmanson v Thompson*, 6 Jur. N. S. 235.

(z) *Best*, sec. 536.

To make clear the following cases, which concern transactions not *prima facie* within the scope of a firm of solicitors' business, but which by their conduct, they may make "partnership business," it may be well to again refer to the business of a scrivener. "Before the establishment of bankers as a distinct occupation, deposits were made with scriveners to be employed in advantageous purchases and speculations, but confiding in him in the meantime, the use of and control over the money, not in the nature of money numbered and specifically reclaimable, but generally, and to be blended with his own, and to be invested when the occasion for which it was destined presented itself (a)."

The receipt of money by one of a firm of solicitors professedly in behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the business of a firm of solicitors, so as without proof of further authority to render the other partners responsible, such a transaction being part of a scrivener's business, and solicitors as such not necessarily being scriveners. But if the money is for a particular investment it is within their business and they are responsible (b).

The Earl of Dundonald retained a firm of solicitors to straighten up the affairs of his late father, the celebrated Lord Cochrane. To a single member of the firm was entrusted the charge of his affairs, and, naturally, during the great length of time it took to arrange the estate an intimacy sprang up between the Earl and his solicitor, though it never went beyond professional friendship. Going abroad to investigate his father's affairs he remitted to this solicitor a large sum of money which the solicitor appropriated. An action being brought against the firm the other partners defended, relying on *Harman v. Johnson*. The defence failed because the money was shown to have been paid to the solicitor by reason of his being one of the firm and for the firm. The defaulter had made charges

(a) *Malkin v. Adams*, 2 Rose, 31.

(b) *Harman v. Johnson*, 2 E. & B. 61.

in the books concerning it. The firm had made large profits out of the business in which it was paid, and it could not be said that the plaintiff had trusted the defaulting partner alone, but rather as one of the firm who had made all the profits out of the transaction (c).

Trustees deposited with a solicitor certain bonds payable to bearer. His partners had no actual knowledge of the transaction, but letters referring to the bonds were charged for in the bills of costs delivered by the firm and copied in their books; and firm cheques were given for payments of interest. The solicitor made away with the bonds. The defence of the other partners was that he had no authority to become custodian of the bonds; that such was not "firm business," citing *Harman v. Johnson*. It was decided that by their course they had made it firm business, as the following extract from the judgment will show:—"As to the principle of *Harman v. Johnson*, which shews that it is not *prima facie* solicitors' business to take care of securities or of moneys for clients, I think it is clear this principle cannot be acted upon without reference to the circumstances of each particular case, and to the course of business as between the parties trusting the securities on the one hand and every member of the firm on the other hand. It cannot be treated as a matter of absolute certainty that in any case in which securities have been trusted to one partner this may not be under the circumstances firm business, because although it is not *prima facie* the duty of a solicitor to act as a money scrivener and to receive money, or to act as a warehouseman or a banker, there is no rule of law laying it down that a solicitor may not do such business, and there is nothing to make it criminal or wrong or negligent in a solicitor so to do under particular circumstances. If therefore it turns out that the solicitor had so acted as to make it "firm business" by reason of the mode in which he had dealt with the books of the firm, and the other partners in the firm have such notice of it as reason-

(c) *Drandonald v. Masterman*, 7 Eq. 504; and see *Plumer v. Gregory*, 28 Eq. 633.

able and prudent persons should get from a proper examination of their own books, there is nothing that decides that in such a case it may not be "firm business." It would be a question of fact in each case, and even though a partner might say, "I do not know anything about this transaction," yet looking at his dealings with his partner, and at the dealings of the partner with the persons who trusted him it may after all be "firm business" (d).

-GEO. LYNCH-STANTON.

(d) *Cleather v. Twisden*, 24 Chy. Div. 781.

EDITORIAL REVIEW.

The Bar Dinner.

The Bar Dinner, as far as display and numbers are concerned, was an undoubted success. The speeches were rather below the standard of last year's, while the noise was above it.

The important matters of judicial salaries and law stamps were notably the subject of remark. With respect to the former, no one needs to be told that the judges' salaries are much below the salaries of many less important functionaries in the country. Indeed they are so small, that duties as onerous and responsible as those of the Judges would be left undone in other walks of life, if there were no greater reward offered for their performance than the salaries which the Judges receive. Nor does it need much force to impress upon the public that there must be some inducements entirely apart from the judicial salary to lead a man to make the sacrifice of a very large portion of his professional income in return for a seat on the Bench.

Whether, notwithstanding this, the fact that the vacancies are filled from time to time is explicable from a consideration of Chief Justice Wilson's hypothesis—that the respect and veneration in which the Bench is held in this Province is largely due to the great learning and courtesy of the judges who have gone before—we will not pretend to decide. It is possible that a man may consider that the reflected light which plays about him on the Bench is an adequate reward for the pecuniary sacrifices which he makes when he dons the ermine; and it is possible that

he may consider that he sufficiently serves his country when he presents a body from which the light may be well reflected. The learned Chief Justice may be wrong; it is to be hoped that he is. But his age, his legal acumen, his position, his inner consciousness, entitle him to speak with authority on this delicate subject, and we leave it without further comment.

The speech of the Chancellor, in response to the toast of Canada, confirmed his reputation as a graceful and ready speaker. His reference to Canada, as having actually realized the dreams of the French explorers who gave us the name Lachine, by furnishing a highway from Europe to China by means of the Canadian Pacific Railway and the line of steamships to Hong Kong, was most happy. In dealing with the question of law stamps he said that he hoped that before long the Attorney-General, who has done so much in the interests of the administration of justice, would abolish the law stamp tax and relieve the profession from the position of tax gatherers for the Province. We understand that Mr. Hodgins, Q.C., the Master-in-Ordinary, has taken great pains in preparing details of the expenditure for stamps in his office. The fees thus payable are out of all proportion to the importance of the work and to the fees earned by solicitors in the proceedings. In this matter the profession are in happy accord, and if the public could be taught how largely the fees for stamps increase a bill of costs an unanimous demand for the abolition of the tax would be the result. As it is, we look forward with hope to relief from the burden.

Upon another topic, that of decentralization, Mr. MacLaren's speech in responding to the toast of "The Bar," was very forcible. His testimony is valuable because he has had the opportunity of witnessing the administration of justice under both systems—a decentralized one in Quebec, and a centralized one in Ontario. His speech was a warning against decentralization in any form. The esteem and admiration which he says the Bar of Quebec have for that of Ontario is entirely due to our centralized

system. Centralization is absolutely essential to the existence of a strong Bar, and consequently of a strong Bench. There is no doubt that there is a disposition to decentralize business, and some provisions of the Judicature Act are formulated with that object. The members of the profession who practise in Toronto cannot advocate the continuance of our system without being accused of acting in the interest of self; and we are therefore glad of the opinion of one who has been enabled to compare the two systems and side with us on this important issue.

The humorous remarks of a member of the Philadelphia Bar (which by the way, our contemporary has taken *au sérieux*), were well received, and the friendly sentiments of the American Bar, so happily conveyed by him called forth much applause.

CORRESPONDENCE.

The Bar Dinner and the American Bar.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—In a recent article on the Law Society dinner your contemporary the *Canada Law Journal* devotes a paragraph to the American Bar and its representative for that evening, which to me seems unfair in statement, and unjust in conclusion. In the course of the speech, which the article calls “clever and entertaining,” and which was fervid and eloquent as well, the speaker perpetrated the joke “That for ways that are dark and for tricks that are vain the American Bar is peculiar.” The joke seemed to me appropriate, but not original. Your contemporary evidently considered it original, but not appropriate, and hence his homily upon the “Tone” and “Honour” of the English Bar, and his hope that if the American Bar proposes to claim affinity, it will base its claim upon other grounds than the darkness of our ways and the vanity of our tricks.

If the learned editor had been in a condition to hear and to understand, he would have heard the speaker naming their illustrious dead, and have seen him pointing to the portraits of ours; he would have known that the kinship which he did us the honour to claim was based upon their ability and integrity, and the noble objects of our profession. I would have thought, but for the article, that the laws of hospitality should have shielded the remarks of a guest from churlish or invidious criticism, that the “Tone of the Canadian Bar” would have protected him from either comment or inference that might be painful to him, or inimical to the Bar he represented. I submit that on their merits the remarks were not open to the construction that has been placed upon them, and I respectfully suggest to

the learned editor that before he attempts further to remove the mote out of the students' eyes, he search diligently for the beam that is in his own.

I do not propose to make a defence of the American Bar. It needs none. The names of its illustrious dead, and its equally illustrious living, place it in a position too exalted to care who admits it to kinship. The names of a Henry, a Story, a Webster, a Calhoun, a Chase, a Carpenter, an Evarts, a Conkling, a Tilden, and a whole galaxy of others, are not only national but cosmopolitan in their fame. They are identified with a nation's progress, and a nation's greatness. They are as familiar to us as the names of a Cameron, or a Blake, of a McCarthy, or a Robinson. On what ground can we question the ability of the American Bar, or assail its integrity? And it certainly outvies us in courtesy. Or why should we make an after-dinner joke of one of its members the means of pharisaical boasting or senseless insinuation?

I shall conclude by hoping that our neighbours will not take the remarks of a dyspeptic editor, made the morning after a dinner where his digestion was evidently overtaxed, as reflecting the sentiments of the Canadian Bar towards them.

Yours truly,

Toronto.

A BARRISTER.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

THE TORONTO GRAVEL ROAD CO. v. THE COUNTY OF YORK.

*Agreement with municipality—Traction engine—Agreement to withdraw and
discontinue use—Right to use steam engine under.*

The Toronto Gravel Road and Concrete Company, having power to draw wagons by means of a traction engine, entered into an agreement with the County of York, whereby they acquired the right to construct a tramway from the gravel pits along a county road to the City of Toronto. One of the clauses of the agreement was as follows:—"So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highway of the said county, and shall discontinue the use and employment of said traction engine and of any other traction engine upon or along such public highway." The company had power to draw their cars on the tramway by horses or steam, and they claimed the right to put steam engines, which were not traction engines, upon the road over the public highway, notwithstanding the above clause in their agreement.

Held, affirming the judgment of the Court below, 11 App. R. 765, 5 C. L. T. 174, that the use of such steam engines was an infraction of the above clause.

Robinson, Q.C., and Osler, Q.C., for the appellants.

J. K. Kerr, Q.C., and Cassels, Q.C., for the respondents.

KELLY v. THE IMPERIAL LOAN AND INVESTMENT CO.

*Mortgagor and mortgagee—Assignment of equity of redemption in trust—
Reconveyance by trustee—Foreclosure against trustee—Subsequent sale
—Power of sale—Exercise of, by deed after foreclosure.*

Kelly gave a mortgage of leasehold premises to the respondents, with a power to sell on default, with or without notice, and at either public or private sale. The mortgage conveyed the unexpired portion of the current term and "every renewed term." Afterwards Kelly conveyed the equity of redemption in the mortgaged premises to one O'S. in trust to carry out certain negotiations, and left the country. During his absence the lease of the ground expired and it was renewed in the name of O'S. Default having been made in payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, prior to which O'S., having been threatened with such suit, reconveyed the equity of redemption to Kelly, but the deed was never delivered. O'S. then filed an answer and disclaimer of interest in the suit, which he afterwards withdrew and consented to a decree. The mortgagees subsequently sold the mortgaged premises to the defendant Damer for a sum less than the amount due on the mortgage; the deed to Damer recited that the property had been foreclosed. Kelly brought this suit to open foreclosure, to set aside the deed to Damer, and to be allowed to come in and redeem the premises.

Held, affirming the judgment of the Court of Appeal, 11 App. R. 526; 4 C. L. T. 486 (Strong, J., dissenting), that even if the decree of foreclosure were improperly obtained and consequently void, yet the sale to Damer might be supported as an exercise of the power of sale in the mortgage, and should be sustained; and that it passed the renewed term which was included in the mortgage.

McCarthy, Q.C., and Plumb, for the appellant.

MacLennan, Q.C., and A. C. Galt, for the respondents.

ST. LAWRENCE & OTTAWA RAILWAY CO. v. LETT.

*Railway Company—Negligence—Death of wife by—Lord Campbell's Act—
Right of husband to damages.*

Although on the death of a wife caused by negligence of a railway company the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, and which would have to be replaced by hired services, is a substan-

tial loss for which damages may be recovered under Lord Campbell's Act, as is also the loss to the children of the care and moral training of their mother.

The judgment of the Court, 11 App. R. 1 ; 5 C. L. T. 30, affirmed.

Robinson, Q.C., for the appellants.

McCarthy, Q.C., and *O'Gara, Q.C.*, for the respondent.

QUEBEC.]

KNIGHT v. WHITFIELD.

Public Company—31 Vict. cap. 25, secs. 11, 17, 19 and 20 (Q)—Action for calls—Increased capital—By-laws.

Under the authority of 31 Vict. cap. 25, sec. 11, at a meeting of the directors of the S. I. Stone Chinaware Company a by-law was passed increasing the capital stock of the company by the issue of 250 additional shares of \$200 each, payable by monthly instalments of ten per cent. each. At the general meeting of the shareholders, subsequently held for the election of directors and other business, this By-law was confirmed.

An action was brought by K., as assignee of the company (which was insolvent), against W., an original stockholder and director, for calls on 20 shares of new stock. The only evidence relating to the adoption of the by-law by two-thirds of the shareholders in amount, at a special meeting called for the purpose of increasing the stock, and to calls having been made on W., was the minutes of the meeting of the directors and of the general meeting of the shareholders. The Superior Court held that there had been no calls made.

This judgment was affirmed by the Court of Queen's Bench (Appeal side) ; and on appeal to the Supreme Court of Canada, it was

Held, affirming the judgment of the Courts below, that no calls had been made on W., and therefore he was not liable.

Per Fournier and Henry, JJ. There was no evidence that the by-law had been confirmed, as provided for by section 11 of 31 Vict. cap. 25, and on that ground also the appeal should be dismissed.

Robertson, Q.C., for the appellant.

Geoffrion, Q.C., and *Paradis*, for the respondent.

NEW BRUNSWICK.]

REGINA v. DUNN.

Petition of right—Provincial debt—Liability of Dominion for—Order in Council—Account stated—Consideration—Right of petition.

Prior to Confederation one T. was cutting timber, under licence from the Province of Canada, on territory in dispute between that province and the Province of New Brunswick. In order to utilize the timber so cut, he had to send it down the St. John River; and it was seized by the authorities of New Brunswick, and only released upon payment of fines. This continued for two or three years, until T. was obliged to abandon the business.

As a result of negotiations between the two provinces, the boundary line was finally fixed, and a commission was appointed to determine the state of accounts between them in respect to the disputed territory. One member of the commission only, reported New Brunswick to be indebted to Canada in the sum of \$20,000 and upwards, and in 1871 these figures were verified by the Dominion auditor.

Both before and after Confederation T. frequently urged the Government of Canada to collect this amount, and indemnify the licensees who had suffered owing to the dispute; and finally, by an order in council of the Dominion Government (to whom it was claimed the debt was transferred by the B. N. A. Act), it was declared that a certain amount was due to T. which would be paid on his obtaining the consent of the Governments of Ontario and Quebec. Such consent was obtained, and payments were made by the Dominion Government to T., and to the suppliant to whom the claim was assigned, and the suppliant proceeded by petition of right to recover the balance; the Government demurred on the ground that the claim was not founded upon a contract, and the petition would not lie.

In the Exchequer Court, Fournier, J., overruled the demurrer, and on appeal to the Supreme Court of Canada it was

Held, Fournier and Henry, JJ., dissenting, that there not being shown any previous indebtedness from New Brunswick, the Province of Canada, or the Dominion, to T., the order in council did not create a debt, and the petition would not lie.

Blair, and *Hogg*, for the appellant.

Laflamme, Q.C., and *McIntyre*, for the respondent.

ONTARIO.

**High Court of Justice.
QUEEN'S BENCH DIVISION.****[THE DIVISIONAL COURT.]****REYNOLDS v. ROXBURGH.***Letting of chattel for hire—Implied warranty of fitness.*

Held, that the letter of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let.

W. Nesbitt, for the motion.

Dumble, contra.

LEGACY v. PITCHER.*Local venue—abolition of.*

Held, that the effect of the Judicature Act is to abolish all local venues as well those made so by statute as at the common law.

V. McKenzie, Q.C., for the motion.

G. T. Blackstock, contra.

CHRISTIE v. BURNETT.*Memorandum in writing—Statute of Frauds—Parol evidence.*

Held, that the letters of the defendant set out in the case constituted a sufficient note or memorandum in writing within the 17th section of the Statute of Frauds, and that parol evidence was admissible to show what the words "work" and "Rig" used therein referred to.

Creasey, Q.C., for motion.

Masson, Q.C., contra.

REGINA v. FEARMAN.

Larceny—43 Vict. cap. 28, sec. 66—Conviction.

The prisoner was indicted for larceny under The Indian Act, 1880, section 66, and was convicted.

Held, Wilson, C.J., dissenting, that he ought not to have been convicted, because, per Armour, J., the wood, the subject of the alleged larceny, was not seized and detained as subject to forfeiture, and because, per O'Connor, J., the affidavit, required by section 64, had not been made, and was a condition precedent to a seizure.

Per Wilson, C.J. He was properly convicted.

Johnson, for the Crown.

McKenzie, Q.C., contra,

SHERIDAN v. PIDGEON.

Negligence—Surgeon—Addition to verdict.

In an action against the defendant for negligence as a surgeon, the jury found for the plaintiff, with this addition:—"We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully, or through inattention."

Held, a mere expression of opinion, neither nullifying nor affecting the verdict.

W. Nesbitt, for the motion.

Masson, Q.C., and Stone, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 16TH FEBRUARY, 1886.]

In re BUSHELL v. MOSS.*Prohibition—Division Court—Title to land—Question of fact.*

The plaintiff sued in a Division Court for the conversion of a mirror, which the defendant contended was annexed to the freehold and passed therewith.

The judge of the Division Court found that the mirror was a chattel and gave judgment for the plaintiff.

Held, that the Court could not interfere by way of prohibition.

W. H. P. Clement, for the plaintiff.

Aylesworth, for the defendant.

CHANCERY DIVISION.

[CAMERON, C.J.C.P., 1ST FEBRUARY, 1880.]

INGALLS v. McLAURIN.

Mortgagor and Mortgagee—Collusive sale—Fraud—Right to redeem.

Action for redemption. The defendant, being mortgagee of certain lands, advertised them for sale under the power of sale, and employed one M. to buy them in for him, and M. bought them in in his own name, but forthwith conveyed them to the defendant. The defendant being advised that the sale was bad, owing to defects in the mode of exercising the power, went to J., the mortgagor, and bargained with him for the purchase of his wife's dower (which was not barred in the mortgage), and of two adjoining lots, for \$700. A deed was accordingly prepared and signed, J. joining therein under a mistaken idea that he was doing so merely for conformity, and that the defendant already had a good title to the equity of redemption under the mortgage sale. This deed was sent to J.'s solicitors, who advised him as to his legal position, and retained the deed in their hands while J. brought this present action for redemption.

Held, that the plaintiff should be allowed to redeem.

Though it may be that a mortgagee is not, strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mortgage money, the right of the mortgagor to redeem is a very pronounced and decided right, and one that he cannot be deprived of by any dealing between him and the mortgagee that is not carried out in a full spirit of fairness, without undue pressure, influence, or concealment of what he should be informed of by the mortgagee.

J. R. Roaf, for the plaintiff.

W. Nesbitt, and *A. R. Lewis*, for the defendant.

[FERGUSON, J., 8TH DECEMBER, 1885.]

DUFRESNE v. DUFRESNE.

Sale at undervalue—Purchaser for value without notice—Advance by wife to husband without any contract for repayment.

L. F. D., being the owner of certain valuable property, mortgaged it for \$700, became of unsound mind, and was confined in an asylum. During his confinement, M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and it was sold for \$900 to E. R., sister of M. A. D. Two years afterwards, E. R. sold the property to M. E. B. for \$5,000, and a mortgage for \$4,000 unpaid purchase money was taken to M. A. D.

In an action by L. F. D., by L. D., his next friend, to set aside the sale, or for an account, it was

Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D.; but that as M. E. B. was a purchaser for value without notice, the sale must stand; but an account of the proceeds was ordered against M. A. D. During the trial M. A. D. obtained leave to amend, and claimed to be allowed a sum of \$1,500 which she alleged she had advanced to her husband, the plaintiff, as a loan, and which was employed in the purchase of the property and building thereon.

Held, that, as no contract for repayment was shown, no security being taken, and no attempt having been made to collect the amount, although many years had passed, it was not a loan, and the wife could not recover it.

W. H. Barry, and Sinclair, for the plaintiff.

Lees, Q.C., for the defendants M. A. D. and E. R.

Olivier, and O'Gara, Q.C., for other defendants.

[12TH JANUARY, 1886.]

IMPERIAL BANK v. METCALFE.

Vendor and purchaser—Conditions of sale—Specific performance—Requisitions on title—Statute of Uses—Discharge of mortgage.

Where, on a sale of lands, the contract provided that the purchaser should be allowed ten days to make requisitions on title, and the purchaser made certain objections within the ten days, and the answer not being satisfactory, refused to complete, whereupon the vendor sued for specific performance, and obtained the usual judgment:

Held, that the purchaser could not raise in the Master's Office fresh objections not raised within the ten days mentioned in the contract.

Certain owners of the equity of redemption in lands by deed granted the same to "A. his heirs and assigns to have and to hold the same to A. his heirs and assigns unto and to the use of B. his heirs and assigns."

This was dated 17th July, 1875, and registered 21st July, 1875.

Held, that, whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B.

The equity of redemption in the said deed conveyed was subject to two mortgages, the M. mortgage, and the S. mortgage. The discharge of the M. mortgage was registered on 21st July, 1875, the same day as the deed.

Held, that the deed must be assumed to have been delivered before the day it was registered, and the discharge of the M. mortgage on registration operated as a reconveyance to B., who was the assignee of the mortgagor within the meaning of the statute respecting the effect of registering a discharge of a mortgage.

MacLennan, Q.C., and *A. C. Galt*, for the defendants.

Bain, Q.C., and *Masten*, for the plaintiffs.

[15TH FEBRUARY, 1885.]

*In re FLEMING.**Executor—Compensation—Commission—R. S. O. cap. 107, ss. 36-40.*

This was a petition by an executor of the will of Charles Magrath, deceased, asking the Court to fix a fair and reasonable allowance for his care, pains and trouble and time expended as executor in and about the estate of the said Charles Magrath. A reference was accordingly made to the Master in Ordinary to fix the amount of compensation under R. S. O. cap. 107, secs. 36-40. Evidence was taken in his office, from which it appeared that Charles Magrath died in the month of May, 1884, leaving a will by which he made William Magrath sole legatee and devisee of the whole of his property with the exception of an annuity of \$400, payable to his widow. He added, however, the following words after the general bequest to William Magrath: "I commend to his care my said dear wife, and that notwithstanding the above bequest that in as far as in him lies, he shall see that she does not want for all reasonable maintenance and comforts becoming her station in life;" and he appointed the present petitioner and W. Magrath executors of his will. The evidence further showed that the estate of which Charles Magrath died possessed amounted to between \$115,000 and \$120,000. of personalty consisting of some \$32,000 on deposit in the bank, and of a number of debentures and stock of various description, a great many of which were payable to bearer. The evidence further showed that the actual labour involved in connection with the estate, which, under any circumstances, did not seem to have been very great, was done by the solicitor of Mr. William Magrath, acting also for the present petitioner in the matter; and that the present petitioner did such acts as were required by way of conformity, such as signing cheques when required, and doing formal acts required, first, to put the estate in his name and in the name of his co-executor, and then to transfer it to Mr. William Magrath solely; but the petitioner appeared to have relied implicitly on the advice of the solicitor as to what he did. Mr. William Magrath himself lived away from Toronto where the work was done, and where the deceased died, and consequently what there was for the executor to do was mainly done by the petitioner, who also exerted himself to procure an additional sum for the widow in furtherance of the wishes of the testator expressed in the words quoted above. The Master in Ordinary allowed as commission two and a half per cent. upon the \$32,000 on deposit in the bank, which, it appeared, had been paid out on the cheque of the executors to various persons to whom the said solicitor had lent it upon mortgage of real estate; and he allowed a commission of one per cent. upon the amount of the debentures and stock. Upon appeal from his report on the ground that the commission was inadequate and not in accordance with the principles heretofore acted upon by the Court in these cases, the commission for the petitioner was increased to three and one half per cent. upon the whole of the estate. After a review of the authorities, the

learned Judge said: "I think I may without more words express the opinion of which I had scarcely any doubt at the beginning or at the argument that our Courts have adopted a commission or per centage as a means of ascertaining or measuring the amount of the allowance to be awarded to executors, trustees and administrators under the provisions of the statute, and that it is the mode adopted generally when the circumstances of the case are such as to admit of its ready adoption, and that the cases in which a different mode or method has been adopted are to be considered as exceptions to this rule which should be considered as the general rule—the exception in each instance being for some good reason appearing in the case—and I think it sufficiently appears from the cases that the usual per centage or commission allowed is five per cent. upon the amount of the estate got in and paid for or properly applied, and that this in the ordinary case is allowed upon the determination of the trust, although there are exceptions to this last. This rate of five per cent. in the ordinary case seems to be so generally alluded to in the authorities that I think it may be safely said to have been adopted as the general rule in measuring the allowance under the provisions of the statute." He then proceeded to say that looking at the relative amount of work done and services rendered by the petitioner as compared with the co-executor, William Magrath, be considered, that of the commission of five per cent. the petitioner was entitled to at least one per cent. more than the half.

S. H. Blake, Q.C., and A. H. F. Lefroy, for the petitioner.

Boswell, for the respondent, William Magrath.

IN CHAMBERS.

[BOYD, C., 15TH DECEMBER, 1884.]

YEMEN v. JOHNSTON.

Money in Court—Assignment—Solicitor's lien—Priority—Salvage money.

The fact that an assignment was made by the defendant to a creditor of a portion of a fund in Court, as to which litigation was pending as to the amounts to which the parties were entitled, and which, therefore, involved the incurring of costs before the amount could be apportioned, imposed upon the assignee the necessity of submitting to all just and proper deductions for the charges of the solicitors by whose exertions the portion of the fund payable to the defendant was ascertained. To the extent to which the defendant's solicitors incurred costs in resisting and prevailing against the account brought in on behalf of the plaintiff, to that extent their lien should precede the claim of the assignee. Such costs are in the nature of salvage money and are always entitled to meritorious consideration.

Shepley, for the solicitors.

Holman, for the assignee.

[BOYD, C., 23RD DECEMBER, 1885.]

BLEAU v. BLEAU.

Vendor and purchaser—Sale of infants' estate—Title—12 Vict. cap. 72—R.S. O. cap. 40, sec. 76.

Certain infants' lands were sold under an order, which appeared upon its face to have been presented under the statutable jurisdiction of the Court of Chancery relating to the sale of infants' estate, 12 Vict. cap. 72, R. S. O. cap. 40, sec. 76. The petition and order were entitled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the Court. The order for sale set out that what was being done was because it was beneficial to the infants, and the conveyance was executed by the Referee for the infants.

Held, that the Court would never allow the infants to recede from what was so done for their benefit, and that a subsequent purchaser cannot raise doubts as to jurisdiction, when upon the face of the proceedings the statute authorizing the sale appears to have been followed.

Calvert v. Godfrey, 6 Beav. 97, considered and distinguished.

R. M. Meredith, for the purchaser.

H. Becher, for the vendor.

[PROUDFOOT, J., 5TH FEBRUARY, 1886.]

CANADIAN PACIFIC RAILWAY COMPANY v. MANION.

Changing place of trial—Ejectment—Rule 254—R. S. O. cap. 51, sec. 23.

In an action of ejectment the place of trial may be changed by order of a judge. If the power is not given by rule 254, it is not taken away by that rule, and it is given by R. S. O. cap. 51, sec. 23.

On appeal to the Divisional Court of the Chancery Division this decision was affirmed.

Arnoldi, for the plaintiff.

W. H. P. Clement, for the defendants.

[ROSE, J., 16TH FEBRUARY, 1886.]

BROWN v. PORTER.

Postponing trial—Costs.

Where a party has made diligent efforts to secure the attendance at the trial of a witness within the jurisdiction of the Court, and has failed to secure it from a cause which he could not control, the costs of an application by such party to postpone the trial should be costs in the cause, unless the evidence could be taken before a special examiner, or the knowledge of the impossibility of securing the attendance of the witness came to the applicant in time to enable him to advise the other side so that the witnesses might be notified not to attend.

Watson, for the plaintiff.

Lount, Q.C., for the defendant.

[THE MASTER IN CHAMBERS, 11TH FEBRUARY, 1886.]

ONTARIO BANK v. REVELL.

Interpleader order—Sale of goods—Payment into Court—Gross proceeds.

Where an interpleader order directs the sheriff to sell the goods seized and pay the proceeds into Court, it should provide that the whole proceeds be paid in, without deducting the sheriff's expenses of sale or possession money.

Langton, for the sheriff.

Alfred McDougall, and *Holman*, for the claimants.

Leeming, for the execution creditors.

In the Maritime Court.

(Reported by R. Gregory Cox, Esq., Barrister-at-Law.)

THE HURON.

Master's wages—Jurisdiction of the Court when vessel registered in Ontario—Jurisdiction over "special contract"—Severable contracts—Forfeiture for disobedience of orders of owner—Forfeiture for drunkenness—Counter-claim.

The *Huron* was uninsured. The plaintiff, who was employed as master for the season, was ordered in September to bring the vessel home. He wilfully disobeyed orders, and engaged in the dangerous business of carrying wood from an exposed place on the open coast of Lake Erie, to Detroit. He took the vessel to the loading place on a Saturday evening and kept her there all Sunday. Early on Monday morning she was driven ashore.

Held, that by his disobedience of the direct and positive orders of the owners, he had forfeited all right to wages.

Held, also, upon the evidence, that he acted wrongly in keeping the vessel in an exposed position all Saturday night and Sunday, and that he would not have done so had he not been suffering from the effects of liquor, and that this was not a mere error of judgment, but misconduct, for which he was responsible to the owners.

Held, also, that under the circumstances of this case, the counter-claim of the owners, should not be disposed of.

Held, also, on the question of jurisdiction the Maritime Court of Ontario has jurisdiction over all claims for Master's wages, whether the vessel is "within the jurisdiction of its government" or not, and that this jurisdiction is not ousted by any collateral agreement between the master and the owner, or an agreement for an increased rate of wages depending upon the amount earned by the vessel during the season.

Held, further, that objections to the jurisdiction of the Court may be raised at the trial, though not taken in the answer.

This was a cause of wages instituted in this Court at St. Catharines by one George Brooks, claiming as master of the schooner *Huron* against the vessel and her owners intervening.

The petition was filed on 19th of November, 1884, and the schooner in due course arrested. The petitioner claimed seven months' wages as master at \$60 a month, less the sum of \$165, which he had retained out of the earnings.

The vessel was owned by Hannah Lobb, Charles Lobb, and Peter Algie, executors of the will of Charles Lobb, deceased; and they filed an answer, and afterwards (by leave of the Court) a supplemental answer, setting up that in the Spring of 1884 they had employed Brooks, as master of said vessel, for the ensuing season; that before starting out on the first trip, the vessel was not in condition to be classed for insurance, but required a new main-mast, and that Brooks promised to procure a new main-mast at some point on Lake Erie on her first trip, so that she might be classed and insured; that Brooks also agreed to report to the defendants at every port, and keep them fully informed of the movements of the vessel. They further alleged that Brooks failed to get a new main-mast, or to report as promised, and that in September they went to Tonawanda, near Buffalo, where the vessel then was, and ordered Brooks to bring her home, as she was uninsured, and the season was becoming hazardous and perilous for vessels; that Brooks in contravention of their orders, and without any authority, proceeded with the vessel to Tyrconnel (a dock or wharf on the open coast of Lake Erie), without the defendants' knowledge, and they knew nothing of his movements until they were notified that the vessel was stranded on the shore near Tyrconnel. They further alleged that Brooks was frequently intoxicated and unfit to discharge his duties as master, and while intoxicated took the vessel to Tyrconnel, where there is no harbour, but merely a loading-place on the open coast, on a Saturday, and allowed her to remain there all Sunday, instead of taking her to a port of safety, in consequence of which the vessel was stranded. The defendants also charged Brooks with collusion with the wreckers, who took the vessel off the shore. They submitted that by his misconduct Brooks had forfeited his right, if any, to wages as master, particularly by his disobedience of the defendants' orders; and they prayed, by way of cross-relief, that Brooks should make good to them the damages they had sustained through his misconduct, and that he should be ordered to indemnify them against the claims of the wreckers who rescued the vessel.

The cause was tried before E. J. Senkler, Sur. J., at St. Catharines, on 10th March, and 2nd May, 1885.

No objection to the jurisdiction of the Court was raised by the answers, but on the opening of the case *R. Gregory Cox*, for the defendants, objected to the jurisdiction of the Court, on two grounds which are fully dealt with in the Judgment.

In support of the first objection he referred to:—

The Favourite (a); *The Lord Hobart* (b); *The Batavia* (c); *The Repulse* (d); *The Prince George* (e); 7 & 8 Vict. cap. 112, sec. 16 (Imp.); 24 Vict. cap. 10, sec. 10 (Imp.); 26 Vict. cap. 24, sec. 10; 4 C. L. T. 153, 213; *The*

(a) 2 C. Rob. 232.

(b) 2 Dod. 104.

(c) 2 Dod. 540.

(d) 2 W. Rob. 399.

(e) 3 Hagg. 376.

Ferret (f); *The Vera Cruz* (g); 36 Vict. cap. 129 (Seaman's Act, 1873), 40 Vict. cap. 21; 45 Vict. cap. 34, sec. 2; Merchant Shipping Act, 1854, secs. 189, 191.

Upon the second objection he cited:—*The City of Petersburg* (h); *The Sydney Cove* (i); *The Mona* (j); *The Riby Grove* (k); *The De Brescia* (l); *The Harriet* (m); *The Isabella* (n); *The Enterprise* (o); Adm. Court Act, 1861, 24 Vict. cap. 10, sec. 10.

Brennan, for the petitioner, relied upon the Vice-Admiralty Courts Act, 1863, sec. 10 (2), and the Dominion Statute (1882), 45 Vict. cap. 34, sec. 2, as conferring on the Court jurisdiction over all claims for masters' wages.

These objections were over-ruled, and a considerable amount of evidence was taken, upon which the Court found the following facts to be established:—

Upon the 20th of September Mrs. Lobb went to Tonawanda to get the vessel brought home, as it was uninsured, and she had lost all confidence in Brooks, as he had not reported to her, or procured the new main-mast as promised. Algie, her co-executor, was with her, and read to Brooks the letter of the insurance agent, stating that the risk (which had been taken conditionally upon the vessel being classed) was cancelled. Mrs. Robb then ordered him to bring the vessel home. She returned again on 2nd October to Tonawanda, where the vessel still lay, and Brooks being absent, left orders with Cooney, the mate, to tell Brooks to bring the vessel home, as she was not insured, and was earning nothing. The mate delivered this message to Brooks, who answered, "Let Mrs. Robb go to h—l, we will go up the Lake!" In wilful disregard of her orders he took the vessel up the Lake and began carrying wood from Tyrconnel to Detroit. When he came back for a second load, he was obliged, by the state of the weather, to put into Port Stanley and remained there some time, making several unsuccessful attempts to get to Tyrconnel, but being prevented by adverse winds. At length on Saturday evening, 25th October, he succeeded in getting there, and anchored near the dock. He remained there all Saturday night and Sunday, though the wind and sea were materially increasing, and there was a prospect of a gale. Early on Monday morning the vessel began to drag her anchor, and in spite of all their efforts she soon went ashore.

At Port Stanley there was liquor on board the vessel, and he was suffering from the effects of the liquor on the Saturday and Sunday referred to.

(f) L. R. 8 App. Cas. 329.

(g) L. R. 10 App. Cas. 59.

(h) Young's Ad. Dec. 1.

(i) 2 Dod. 11.

(j) 1 W. Rob. 137.

(k) 2 W. Rob. 52.

(l) 3 W. Rob. 6.

(m) 1 Lush. 285.

(n) 2 Rob. 241.

(o) 5 L. T. R. (N. S.) 29, 210.

Brennan, for the petitioner, submitted that, upon the evidence, *Brooks* had exercised his best judgment in the course he took at *Tyroconnel*, and that if he was wrong, it was a mere error of judgment, for which he was not responsible. In any event, disobedience would not entail a forfeiture of wages previously earned. As to the counter-claim, the Court had no jurisdiction, the defendants should sue at law. He cited:—*The Camilla* (p); *Cutler v. Powell* (q); *Mundel v. Steele* (r); *The Roebuck* (s); *The Dexter* (t); *The Thomas Worthington* (u); *The Duchess of Kent* (v).

Cox, for the defendants, contended that disobedience, such as proved here, resulting in loss to the defendants, greatly exceeding the plaintiff's claim, entailed an entire forfeiture of wages. He cited *The Thomas Worthington* (w); *The Exeter* (x); *The Fairport* (y); *The Mariner* (z); *The Luna* (a).

The amount (\$600—\$700) expended by the plaintiff in repairing the vessel, was a "disbursement on account of the vessel," and the plaintiff should be declared to have forfeited this also, as a necessary part of his claim, and also under the special agreement proved, that it should be security for his good behaviour. The defendants are also entitled to be repaid the expense they had been put to through the plaintiff's misconduct, and the amount required to repair the damage to the vessel, and also to be indemnified by the plaintiff against the claims by the wreckers, now in litigation.

The Merchant Shipping Act, 1854, sec. 191, expressly empowers the Court in any proceeding "touching the claim of a master to wages," where any right of set-off or counter-claim is set up, "to enter into and adjudicate upon all questions, and settle all accounts then arising or outstanding and unsettled." He further cited *Smith's Merc. Law*, p. 448; *The Sir Charles Napier* (b); *The Repulse* (c); *The City of Mobile* (d); *The New Phoenix* (e).

The plaintiff's drunkenness, even if not sufficient in itself to effect a forfeiture of wages, entitled the defendants to relief under their counter-claim. They clearly had not the benefit of his sober judgment, and had

(p) Swa. 312.

(q) *Smith's L. C.*, 7th Ed., 1.

(r) 8 M. & W. 868.

(s) 31 L. T. (N. S.) 274.

(t) 20 L. T. (N. S.) 820.

(u) 3 W. Rob. 128.

(v) 1 W. Rob. 283.

(w) 3 W. Rob. 128.

(x) 2 C. Rob. 251.

(y) L. R. 10 P. D. 13.

(z) *Emden's Digest*, 1881, col. 129.

(a) 3 Hagg. 347.

(b) L. R. 5 P. D. 72.

(c) 4 N. of C. 169; 5 N. of C. 348.

(d) L. R. 4 A. & E. 191.

(e) 2 Hagg. 420.

it not been for this the accident would not have occurred. Upon this he cited: *The Macleod* (f); *The Lady Campbell* (g); *The Blake* (h); *The Malta* (i); *The Ealing Grove* (j); *The New Phoenix* (k); *The Gondolier* (l); *The Alexander Williams* (m).

SENKLER, SUR. J., 12th January, 1886.—Before dealing with the facts of the case it will be well to consider two objections to the jurisdiction of the Court to entertain the claim of the plaintiff taken by Mr. Cox for the defendants. These objections were not taken in the defendants' answer, but Mr. Cox contended that he was entitled to raise them, citing the case of the *City of Petersburg* (n), and I am of the opinion I should consider them.

They are:—1. That as the *Huron* is owned and registered in Ontario, and the contract was made and all the parties reside in Ontario, the Maritime Court of Ontario has no jurisdiction in this, a case of Master's wages.

2. That the contract sued on is a "special contract," and therefore beyond the jurisdiction of this Court.

As to the first objection this Court has by the Act 40 Vict. cap. 21, sec. 1 (D), the same jurisdiction in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce on any river, lake, canal or inland water, of which the whole or any part is in Ontario, as any existing British Vice-Admiralty Court would have if the process of such Court extended to Ontario.

By the Vice-Admiralty Courts Act 1863 (Imperial Act, 26 Vict. cap. 24, sec. 10), the matters in respect to which the Vice-Admiralty Courts shall have jurisdiction, are defined, and amongst them is (No. 2), "claims for the master's wages, and for his disbursements on account of the ship."

This, the plaintiff contends clearly gives the Court jurisdiction in the present case.

The defendants contend (as no doubt is the fact), that Courts of Admiralty had no jurisdiction originally to entertain claims for master's wages, but the master was left to his common law remedy on his agreement with the owner, that the first relief given to the master in this respect was by the Imperial Act, 7 & 8 Vict. cap. 112, sec. 16, which, however, only applied to bankruptcy of the owners, and is now repealed.

That by the Merchants' Shipping Act of 1854, Imperial Act, 17 & 18 Vict. cap. 104, sec. 101, the master was for the first time given the same

(f) L. R. 5 P. D. 254.

(g) 2 Hagg. 5.

(h) 1 W. Rob. 74.

(i) 2 Hagg. 158.

(j) 2 Hagg. 15.

(k) 1 Hagg. 198.

(l) 3 Hagg. 191.

(m) Young's Ad. Dec. 217.

(n) Young's Ad. Dec. 1; 2 Stuart 345.

rights, liens and remedies for the recovery of his wages, which by that Act or by any law or custom, any seaman not being a master had for the recovery of his wages.

This section is contained in the third part of the Act, and by section 189 so much of the third part of the Act as relates to rights, to wages, and remedies for the recovery thereof, applies to all ships registered in any of Her Majesty's Dominions abroad, *when such ships are out of the jurisdiction of their respective Governments*, and to the owners, masters, and crews of such ships. Consequently this section 191 does not give any remedy to a master of a ship registered in any of Her Majesty's Dominions abroad, which is at the time within the jurisdiction of the government to which it belongs; and if there were a Vice-Admiralty Court established in Ontario, such Court could not under this section have jurisdiction over a claim for wages by a master of a ship registered in Ontario against such ship.

This being the law at the time the Vice-Admiralty Courts Act 1863, was passed, it is urged that section 10 of that Act only gives the same jurisdiction in cases of master's wages as then existed, and nothing more; and thus the limitation imposed by the Merchants' Shipping Act above referred to still remains, and that the last named Act is not repealed or affected by the former.

In support of this view it is urged that the limitation as to suits for seamen's wages imposed by section 189 of the Merchant's Shipping Act has been held not to be repealed by the Vice-Admiralty Courts Act 1863. See *The Margaretha Stevenson* (o); *The Royal* (p); *The Monarch* (q). (The last two cases are also reported in Cook's Edition of Stuarts' Decisions just published); also *The Ferret* (r). The last named case does not seem to me to touch the point, but the others undoubtedly do—and if this is the case, it is asked why should not the limitation imposed by section 191 also be in force.

By the Seaman's Act 1873 (36 Vict. cap. 129, bound in the Dominion Statutes for 1874), section 59, masters of ships registered in any of the provinces to which the Act applies, are given the same rights, liens and remedies for the recovery of their wages as any seaman not a master has, and of course this puts an end to the limitation now under consideration in those provinces.

This Act, however, only applies to the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia, and it is urged that the power given by 45 Vict. cap. 34, sec. 2, to "seamen and other persons employed on board a ship" on any river, lake, canal, or inland water of which the whole or any part is in the Province of Ontario, to recover their wages in the manner provided by the Seaman's Act 1872, does not extend to masters, but only to seamen and others employed in a subordinate capacity.

(o) 2 Stuart 192.

(p) 4 L. C. R. 146.

(q) 4 L. C. R. 214.

(r) L. R. 6 App. Cas. 329.

If the view contended for by the defendants' counsel were to prevail, the result would be that masters of vessels registered in Ontario would be without any remedy *in rem* for their wages while the vessel was in Ontario, although masters in a similar position in the other provinces in which there is a Court of Vice-Admiralty would have such remedies, and although it was undoubtedly intended that the Maritime Court of Ontario should have the same jurisdiction as any Court of Vice-Admiralty.

I do not, however, think that this is the true meaning of the Vice-Admiralty Courts Act of 1863, but I am of the opinion that it was intended by that Act to give jurisdiction to the Court to entertain *all claims for wages* by masters, irrespectively of any questions as to whether the ship was out of the jurisdiction of its government or not, and in the case of *The Aura* (s), decided in March, 1870 (which Mr. Cox very properly called my attention to), Sir William Young adopted this view and gave judgment in favour of a master for wages, holding that jurisdiction was conferred on the Court by the Vice-Admiralty Courts Act of 1863.

I therefore disallow this objection.

As to the second objection. It is contended that the agreement between the master and the owner was that the master should be paid \$60 a month in any event, and \$70 if the vessel cleared \$1,500, and that the master also agreed to deposit \$600 or to advance that sum towards the repair of the vessel, to remain as security for his good behaviour, and that those facts created a special agreement between the parties, and ousted the Court of jurisdiction.

There is no doubt that the Court of Admiralty originally had no jurisdiction over cases of seamen's wages when founded on *special and extraordinary contracts*. *The Sydney Cove* (t); *The Mona* (u). Many other cases may be found on the same point sustaining the same view. A distinction, however, is taken between cases in which the special agreement pervades the whole of the contract, in which case there is no jurisdiction, and cases in which part of the voyage is on an ordinary agreement, and the special agreement is only contingent, in which case the Courts will pronounce for that part of the wages which is claimed under the ordinary contract. *The Riby Grove* (v). This seems to me to dispose of the objection under consideration. The plaintiff only claims the \$60 a month which is according to regular contract. He does not contend that a contingency has happened which was to entitle him to the \$70; and the deposit of \$600 as security for plaintiff's good behaviour has nothing to do with the question of wages.

It does not, therefore, become necessary to consider how far the alteration in the law made by the 10th section of the Admiralty Court Act 1861 (24 Vict. cap. 10, Imp.), by which jurisdiction is given to the High Court of Admiralty over claims by seamen for wages earned on board ship, *whether the same be due under a special contract or otherwise*, is applicable to suits in Vice-Admiralty Courts. These words are not in the Vice-Admiralty Courts Act 1863, and in the case of the *City of Peter-*

(s) Young's Ad. Dec. 59.

(u) 1 W. Rob. 137.

(t) 2 Dod. 11.

(v) 2 W. Rob. 52.

burg, already referred to, Sir William Young held that this provision of the Act of 1861 does not apply to and is not covered by the Act of 1863, and that Vice-Admiralty Courts have no jurisdiction in cases of wages earned under special agreements.

I disallow this objection also.

Then as to the merits. (After reviewing the evidence, the learned Judge proceeded.) Mrs. Lobb has been sued by the owners of the tug *Charlton* for \$6065.27, the amount of the bill for getting the vessel off. She has also paid \$48.10 towage bills; \$136.60 for moving the anchor and chains and freight on same; \$200 for the services of the tug *International*, in assisting to rescue the vessel; and \$98 dry-dock bill, amounting to \$482.70. She has also paid wages earned after the vessel left Tonawanda, amounting to about \$300, and \$45 costs.

Evidence was also called to show that the vessel was severely injured by being cast ashore, and that it would cost between \$600 and \$700 to repair her. The evidence as to amount was not very satisfactory, but there is no doubt it would cost a considerable sum.

Some evidence was offered to show that the plaintiff was guilty of drunkenness while master of the vessel and I am of the opinion that at times he did get intoxicated, but this only happened occasionally and it is not contended that he was guilty of habitual intoxication. The rule of law is clear that habitual intoxication will work a forfeiture of a master's wages; occasional acts of this kind will not.

See *The Atlantic* (w); *The Macleod* (x). In the latter case several decisions of Lord Stowell and of Dr. Lushington are referred to by Sir Robert Phillimore.

Some of the evidence on this point was directed to show that the plaintiff was intoxicated during the time the vessel was at Port Stanley before going to Tyrconnell on 25th October, and was so when he got to Tyrconnell and on the following day and night, when the vessel went ashore.

It is also urged that the plaintiff was negligent of his duty in remaining at anchor near the dock at Tyrconnell all Sunday in the state of the weather. I think the plaintiff acted very wrongly in doing so. He was without protection or shelter from a storm, in a place which according to the evidence of some of the plaintiffs' witnesses, it is very difficult to get away from in some winds, although the plaintiff swore that on this occasion he could have run to Port Stanley, but did not think it necessary to do so. He could not work at the dock on account of the sea, and the sea and the wind were both increasing, yet he persisted in remaining. He was no doubt unwilling to go back to Port Stanley where he had spent so many idle days, and from which he had so much difficulty in getting away, and where he might be laughed at if he returned again. But these were not sufficient motives for his putting the vessel in a position of such danger, and I am strongly of the opinion that he would not have done so had not his temper been soured and his judgment clouded by the liquor he had been drinking, and which according to the evidence of the cook he was still drinking. The result of his remaining was most disastrous to the defendants, the owners of the vessel.

(w) 9 Jur. N. S. 183.

(x) L. R. 5 P. D. 254.

No doubt a mere error of judgment on the part of the master of a vessel will not work a forfeiture of wages: *The Camilla* (y); *The Roebuck* (z). In the latter case it is also said that occasional drunkenness in port on the part of the master of a vessel will not *if not accompanied by neglect of duty*, work a forfeiture of wages.

The question is whether that can be called an error of judgment which is done by the master when under the influence of intoxicating liquor, not to the extent of being actually incapacitated from attending to his duty apparently, but to an extent which affected him somewhat, and to a certain extent impaired his judgment, and which he would not have done had he been perfectly sober or free from the affects of intoxicating liquor. I do not think it can be so called, and I do not think the plaintiff can shelter himself from responsibility for the consequences of his retaining at Tyrconnell on the ground that it was a mere error of judgment.

I do not however rest my judgment on this ground only, or even principally. As I have already stated, I find that the plaintiff was guilty of wilful disregard of orders from the owner of the vessel in sailing up the lake from Tonawanda instead of coming home as he was directed, and had himself promised to do. The consequence of this (wholly irrespective of any question of subsequent negligence on the part of the plaintiff,) was to expose the vessel, from which the insurance had been removed, as the plaintiff was told, to the dangers of navigation against the wish of the owners, and the further result was that from those dangers damages have been sustained by the owners to the extent of thousands of dollars.

The judgment of Dr. Lushington in the *Thomas Worthington* (a), lays down the rule of the law, that a master may forfeit his wages as well as a common seaman, on the ground that the agreement of a master with the owner, is a contract that he shall do his duty as master of the vessel, and upon that consideration be paid a remuneration in certain wages and emoluments. The only difference between the Admiralty Court and other courts of law, being, that in the Admiralty court under ordinary circumstances where any loss has been sustained through negligence or misconduct of the mariner, the amount of the loss is alone deducted from the wages of the mariner, whereas in other courts no wages would be recoverable at all. He adds, "cases may occur even in this court (The Admiralty) where the misconduct may be of so gross a description that *independent of any actual loss sustained by the owners*, the entire forfeiture of wages would ensue, as for instance, if a master had attempted to commit barratry, or if through the voyage he had shewn gross incapacity, or had been constantly drunk." He then proceeds to deal with the facts of the case, assuming as he says, "That there may be such a violation of the contract as would entail *an entire forfeiture of wages*, and that there may be such misconduct or would lead only to a *partial* forfeiture of the same." And then at the foot of page 134, he says, "as a general proposition of law it is unquestionable that *there may be instructions so precise and positive that if the master wilfully disobeyed them though no evil consequences might arise,*

(y) Swa. 312.

(z) 37 L. T. N. S. 274.

(a) 3 W. Rob. 132.

yet his disobedience would entail the entire forfeiture of his wages. Before however he can be subjected to consequences so serious, it must be shewn that he was fully in possession in the most intelligible form of the real intentions of the owners."

In the present case the plaintiff had, as I have found, full and definite instructions from the owner which he wilfully disobeyed for his own purposes, that is to try, as he said, to get his money out of the vessel, and in consequence the owners were put to the heavy loss already mentioned, a loss very far exceeding the claim he puts forward, even if I include his disbursements in repairing the vessel.

It would be difficult to imagine a case of more direct disobedience of orders and of more serious consequences flowing from such disobedience; and applying the principles laid down by Dr. Lushington, which I have just quoted, to the facts as found by me, I cannot hesitate to find that the plaintiff has by his disobedience forfeited all right to wages.

This disposes of the plaintiff's claim, for in his petition he has only asked for his wages and damages for the detention of them, and he makes no claim for disbursements. The defendants have no doubt in their supplemental answer claimed that Brooks had not only forfeited his wages but is also bound to indemnify the defendants against the loss they have sustained through his improper conduct, and have asked to have an account taken of this, and if this were gone into, then the plaintiff could go into the question of his disbursements. By his disbursements I mean the money he spent in fitting out the vessel. His disbursements while the vessel was running, I understand he had deducted from the freight he had received.

Having however found in the defendants' favour that the plaintiff's claim is forfeited by his misconduct, I do not think I ought to go further in the present case. I could not do so in a satisfactory manner; the question of liability of the tug owners who rescued the vessel, is in litigation, and will have to be settled in another court.

I therefore refrain from dealing with the question of plaintiff's liability for damages sustained by the defendants, and of his claim for money paid by him in fitting out the vessel, and simply refuse the prayer of his petition, and give judgment thereon for the defendants with costs.

The vessel of course will be released from arrest.

NOVA SCOTIA.

In the Supreme Court.

[20TH DECEMBER, 1884.]

THOMPSON v. ACKHURST.

Assignment of chose in action—Right to sue in assignor's name—Action for money had—Priority of contract.

W. C. A. made a bill of sale of goods to S. & M., and shortly afterwards made a conveyance of the same property to the plaintiff in trust to pay

off the debt secured to S. & M. by their bill of sale, and to pay off also all other creditors signing the deed, among whom were S. & M. The plaintiffs had before suit assigned the debt for which they were now suing to the original assignor, W. C. A. There was a verdict for the defendant.

Held, that a rule *nisi* for a new trial should be discharged.

Per McDonald, C. J., and McDonald, J. The prior assignment of S. & M. was no defence, as S. & M. had joined in the deed for the plaintiffs, but the plaintiffs could not maintain an action in their own names under R.S. 4th series, cap. 96, sec. 356, having assigned the cause of action to W. C. A., although it appeared that the suit was brought for the benefit of W. C. A.

Per Thompson, J. The property and money sued for were not the property or money of the plaintiffs, but of S. & M., who were not estopped by joining (as creditors) in the conveyance to the plaintiffs.

Per Rigby, J. The defendant had sustained his statutory plea that before action the debt had been assigned to W. C. A., but it would have been competent to the plaintiffs to reply that they were suing for the benefit and with the consent of W. C. A.

[5TH JANUARY, 1885.]

ALMON v. WOODILL.

Description of land by boundaries—Inaccuracy of measurements—Falsa demonstratio—Covenant of seisin.

A lot of land conveyed by the defendant to the plaintiffs by way of mortgage, was described as bounded by lands A. & B., which had previously been conveyed to them, being originally parts of the same lot. The lines of the lot conveyed to the plaintiffs were described by measurements, but the termini were stated irrespectively of the measurement, thus: "250 feet, or until it comes to property of B." The measurements were wrong and resulted in the frontage on the street being much less than that represented.

Held, that the measurements were mere matter of description, and that there was no breach of the covenant of seisin.

[8TH JANUARY, 1885.]

REGINA v. DONOVAN.

Appeal not certified by counsel—Amendment refused.

The allowance of an appeal by the Judge in Equity does not dispense with the statutory requirement of a certificate by counsel. The absence of such a certificate is not a clerical error which can be amended.

RUMSEY v. CUNNINGHAM.

Appeal from refusal of County Court Judge to amend his minutes—Rejection of evidence.

After an appeal had been perfected, an application made to a judge of the County Court to amend his minutes by adding evidence given at the trial but not noted, was refused. An appeal from this refusal was taken under cap. 2, sec. 99, of the Acts of 1880. It appeared that the evidence had been tendered at the trial and rejected as irrelevant.

Held, that an appeal would not lie from the refusal after the appeal had been perfected. Even if the Court believed the learned judge to have been wrong, it would not compel him to add evidence which he had rejected as irrelevant. Rigby, J., dissenting.

Per Rigby, J. The application was wrongly made, the evidence having been rejected at the trial, while the application was to have it added as evidence which had been received but not entered on the minutes.

Per Thompson, J. An appeal would lie, as the decision appealed from was based on a matter of law, viz., the question, whether the judge had power to amend his minutes after appeal taken on the merits.

[17TH JANUARY, 1885.]

CITY OF HALIFAX v. BENTLEY.

Capias—Irregularities in order to hold to bail and affidavit.

An order to hold to bail authorized the issue of a writ of capias out of the County Court of the Province of Nova Scotia. The Commissioner before whom the affidavit for the order was sworn signed himself "Commissioner County Court, County of Halifax."

Held, insufficient ground for setting aside the writ.

[23RD JANUARY, 1885.]

FRASER v. HALIFAX & C. B. R. R. CO.

Attorney and client—General retainer—Compensation for services.

The plaintiff was retained as solicitor for the defendant company in arranging for the right of way and all other matters connected with their works on the Eastern Extension Railway. He rendered accounts from time to time for services rendered in obtaining titles to land through which the railway ran, and other services as barrister and attorney, amounting to about \$300 a year. These accounts included cash outlay for travelling and other expenses, but no charge was made in them for consultations, advice, correspondence, and other professional work. The defendant company being about to transfer their road to the Government of Nova Scotia, the plaintiff made a demand for further compensation

for his services. His right was admitted, and an account rendered for services for six years at the rate of \$1,000 a year. No exception was taken to the charge as being considered excessive, and the plaintiff was requested to act for the company in connection with other legal business. The amount claimed by the plaintiff was included as actual outlay in accounts submitted by the defendant company to arbitrators appointed to determine the amount to be paid the defendant company by the Government of Nova Scotia, and no objection was made to the charge by the company until after the rejection of the amount by the arbitrators as not included in the class of charges to be paid by the Province.

Held, that in view of the extent of the plaintiff's practice and the fact that his retainer would exclude him from all business adverse to the company, the amount claimed by him was not excessive, and that the rule to set aside a verdict for plaintiff should be discharged.

[24TH JANUARY, 1885.]

REGINA v. CUNNINGHAM.

Uttering forged order for payment of money—Uttering forged cheque—Extradition—Trial for offence other than that for which extradited.

The defendant was found guilty on the first and third counts of an indictment, the last count of which charged him with uttering a forged "order for the payment of money." The evidence was that the defendant forged the name W. McF. on the back of a cheque drawn payable to W. McF. or order, and obtained the proceeds, which he appropriated to his own use.

Held, that the cheque when endorsed became an "order for the payment of money" to any one who should present it, and that the conviction on the last count was sustained by the evidence. McDonald, C.J., and Weatherbe, J., dissenting.

The first count of the indictment charged the defendant with uttering a forged cheque.

Held, that this count was not sustained by proof of forgery of the indorsement, and that the conviction on this count must be set aside.

A question having been raised at the trial by demurrer as to the power of the Court to try or convict the defendant for another offence than that for which he was extradited, and having been decided by the presiding Judge against the defendant,

Held, that it was too late to raise the question, by case reserved for the full Court.

DOULL v. LINTON.

Conveyance in fraud of creditors—Evidence of fraud—Statute of Elizabeth.

T. L. caused a deed of certain real estate to be made to a trustee for the benefit of his wife. The title of the real estate was in his son W. F.

L., by whom the deed was made, but it was proved that, although the property was purchased and the consideration money paid by W. F. L., who was then a minor, yet his father had erected part of a double house on the property with the consent of his son, and that the deed from the latter to the trustee was made with the father's concurrence. At the time of the conveyance in trust T. L. was indebted to the plaintiff, and had been "going behind-hand" for some time. There was no consideration for the deed.

Held, that it had the effect of delaying and hindering creditors within the meaning of the Statute of Elizabeth, and was therefore void.

HAWES v. HART.

Certiorari—Finality of magistrate's judgment—Power to review—Jurisdiction limited as to classes of persons—Collateral fact necessary to jurisdiction.

The plaintiff contracted with one F., who professed to be the owner of a vessel, to sail her as master at a stipulated rate of wages. After the lapse of six months F., who had up to that time been on board, left the ship, and the plaintiff discovered that he was not the owner, the possession of the ship having been demanded by the defendant, the real owner.

The plaintiff then sued the defendant before the stipendiary magistrate under 36 Vict. cap. 129, secs. 52 and 59, which enable a master to sue for wages due him not exceeding \$200.

Held, that the stipendiary magistrate had no jurisdiction, and that the judgment could be reviewed on *certiorari*. McDonald, C.J., and Rigby, J., dissenting.

Per Thompson and Smith, JJ. There was no evidence of a contract upon which the action could be based.

Per Weatherbe, J. The case came within the principles as to a jurisdiction given to try cases between persons of a specified class or classes, and the magistrate had no evidence of either of the two classes suing and being sued respectively in this case.

KEARNEY v. DICKSON.

Restraining order—Disclosure of material facts—Preliminary injunction—Convenience or inconvenience of granting injunction.

The plaintiff applied *ex parte* and obtained an order to restrain the defendants from laying water pipes through her land for the purpose of supplying the Provincial Asylum for the Insane. The facts upon which the order was obtained were confined to a statement that the defendants had entered upon land of which the plaintiff had been in possession for several years, and had dug a trench for the purpose of laying water pipes for the purpose mentioned; that the defendants claimed to be acting under the authority of the Provincial Government, but the Government had no right to authorize said acts, nor had the defendants, and the same

were unwarranted; that if the work was not restrained the plaintiff would suffer irreparable injury, as it was to be permanent, and the defendants were not able to respond in damages to any considerable amount. It was not disclosed, but subsequently appeared, that the land through which the defendants were proceeding to lay the pipes had been used for many years as a public highway, and that pipes had been laid therein twenty-five years previously for the same purpose, and the then proprietors had been compensated for the damage.

Held, on appeal from the decision of Thompson, J., dissolving the injunction, that the omission of the plaintiff's counsel, when he obtained the restraining order, to bring before the Court the existence of the highway and its relation to the injury complained of was sufficient ground for dismissing the appeal.

Semble, that a disclosure of the facts referred to would have determined the original application against the plaintiff.

In doubtful cases the Court will generally be governed in granting or withholding a preliminary injunction by a consideration of the relative convenience or inconvenience which may result to the parties.

JENNISON v. MUNICIPALITY OF EAST HANTS.

Prescription against the crown—Right to maintain drains leading from private property to drains in the public highway—Liability of municipality for negligence of surveyor of highways—Obligation of municipality to preserve private rights—Remedy by mandatory injunction.

Plaintiff was the proprietor of land which for a period of thirty years had been drained into an open drain parallel to and within the limits of the public highway, and thence by a covered drain across the highway to a river. The defendant's surveyor altered the open drain by converting it into a covered drain which was no larger than one of plaintiff's drains running into it. As the result of the change, two of the plaintiff's drains

were entirely stopped up and the drainage of his house and land seriously impaired.

Held, that a sufficient prescription was proved to entitle the plaintiff to the use of the open drain, either as against the crown or a private person for the purpose claimed, consistently with the rights of the public to the unrestricted use of easement of passage and corresponding right to have the way efficiently upheld.

Held, also, that it was incumbent upon defendants to show that the end desired by them could not have been efficiently secured without trenching upon plaintiff's rights.

Held, also, that under a prayer for a decree to "reopen and reconstruct the said drain or gutter and said drain under the highway aforesaid, so that it will drain the lands of the plaintiff in as full and ample a manner as it did before the grievance maintained," plaintiff was entitled to a mandatory injunction to restore him to the condition in which he was before the grievances complained of took place. McDonald, C. J., dissenting.

[5TH FEBRUARY, 1885.]

PAYZANT v. BIGELOW.

Laches—Re-entry of cause on payment of costs—Application to be heard after cause called and passed—Argument Ex parte.

The appeal was called in its turn on the docket but it was not ready for argument, the case having only been settled the same day and the papers were ready very shortly after. No injury having been shown to have resulted from the delay and the parties standing in the same position for anything that appeared, notwithstanding the laches of the appellant leave was granted to re-enter the cause on payment of costs..

When a cause or matter is called, either party has a right if the other do not appear to argue it *ex parte*, and judgment will in due course be pronounced, subject to an application based on proper grounds by the other party to be heard.

[7TH FEBRUARY, 1885.]

WOODLOCK v. DICKEY.

Canada Temperance Act—Conviction for violation of, held bad—Conviction must show offence.

A conviction for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act contained no reference to the Act, did not show where the offence was committed, and merely adjudged that the defendant pay \$100 for selling intoxicating liquors.

Held, bad.

The information and warrant cannot be looked at to see that no offence has been committed.

(13TH FEBRUARY, 1885.)

GRANT v. THE TOWNSHIP OF NEW GLASGOW.

Injury by defective sidewalk—Liability of Town—Judgment in favour of plaintiff sustained.

Plaintiff fell and broke a leg in consequence of the defective condition of a wooden sidewalk in the town of New Glasgow. The sidewalk had been constructed by private subscription previous to the incorporation of the town, and at the time of the accident many of the planks were cracked and rotten. A judgment having been given in plaintiff's favour for \$500 damages, the Court refused to disturb it.

[25TH MARCH, 1885.]

McKAY v. WOODILL.

Verdict set aside for excess, and disregard of Judge's instructions—Remittitur only effectual where excess is the result of mistake.

In an action for the malicious issue of a writ of execution under which certain cattle of plaintiff's were taken and sold, the jury, contrary to the instructions of the judge, that they must find simply for damages, returned as their verdict a paper awarding the plaintiff the full value of the cattle, together with \$100 damages.

The verdict, notwithstanding the entry of remittitur, was set aside with costs, and the cause sent for a new trial.

Where a verdict is excessive the entry of a remittitur will be sufficient if the excess is the result of mere mistake and not of an intentional disregard of the instructions of the Court.

KEARNEY v. CREELMAN,

Ejectment—Plaintiffs must show superior title—Verdict for defendants sustained with costs.

Plaintiffs brought ejectment to recover possession of the land upon which the Nova Scotia Hospital for the insane was erected. A verdict was found in favour of the defendants and a rule having been taken to set the same aside,

Held, that plaintiffs could only recover on strength of their own title, and were bound to show a title superior to that under which defendants had possession, and as they had not shown such title the motion to set aside the verdict must be discharged with costs.

In re JAMES CLARK.

Appeal from decree of Judge of Probate—Construction of will—Costs not allowed on the ground that appellant succeeded on a ground not taken below and claimed more than he was allowed.

The testator in one part of his will after devising certain property to his wife for life, directed that after his decease the whole of his property, real, personal and mixed, including that devised to the wife, should be divided into seven equal shares and distributed among his children in proportion of four shares to two of his sons, and one share each to three daughters.

In a subsequent part of the will he directed that after the death of his wife, the portion of his estate devised to her for life should be divided into four equal shares and distributed equally among the two sons and two of the daughters, the survivor or survivors or their heirs.

Held, that the words in the first part of the will must be read so as to except that portion of his estate reserved for the widow, or that the words in the second part being inconsistent with those in the first part,

must prevail, the result in either case, being to except the estate devised to the widow for life from the general estate.

In regard to the "homestead" being a portion of the estate devised to the testator's wife for life, it was provided that, in case both the sons declined to accept it at a valuation, it should be sold and the proceeds divided into four equal shares and appropriated as last above. The property was accepted by one of the sons, and there being no provision of the application in such case.

Held, that it must be treated as part of the assets which the testator directed to be divided into seven equal shares and distributed according.

E. A. B., one of the testator's daughters died without issue before the testator's wife, but after attaining the age of 30, at which age under the terms of the will she would become entitled to the balance of her share of the estate, a portion of it being made payable at the age of 21.

Held, that after reaching the age of 30, her right to her share of the legacy was indefeasible, though payment was postponed until the mother's death, and that her executor was thereby entitled to receive one-seventh of the appraised value of the homestead.

The appellant having succeeded on a claim not made before the judge of probate, and having claimed more than he was allowed no costs were given.

CITY OF HALIFAX v. BROWN.

Conviction for violation of city charter—Alternative punishment—Penalty How recovered.

The defendant having been convicted of a violation of the charter of the City of Halifax, Acts of 1864, chapter 81, section 227, by keeping a disorderly house was adjudged to pay the sum of \$40 and "if the said sum be not forthwith paid to be imprisoned in the city prison for the space of 90 days."

Held, that the alternative punishment imposed was authorized by section 139 of the Act.

Held, also, that under the Acts of 1882, chapter 25, section 19, the penalty was clearly recoverable in the name of the City of Halifax before the Stipendiary Magistrate of the police court.

RANDALL v. DELAP.

Letters of probate—Executor not liable for moneys paid though will set aside—Notice of application to set aside will.

Defendant was appointed executor under a will which, after he had obtained probate and had collected debts, paid legacies, etc., was set aside for want of due execution.

Held, that the granting of probate was a sufficient defence to an action brought by the administrators to recover the moneys paid.

Held, also, that plaintiffs' case was not strengthened by the fact that defendant, before paying the legacies, had notice that the will would be attacked on another ground than that upon which it was set aside.

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QUEEN'S BENCH DIVISION.

WATEROUS ENGINE CO. v. CHRISTIE.

Action on promissory note—Waiver of notice of dishonour—Admission of liability—Verdict sustained with costs though declaration alleged notice and evidence only showed waiver.

In an action against defendant as endorser of two promissory notes the defence relied on was want of notice of dishonour. The evidence of notice was insufficient, but defendant admitted that he offered to settle the notes in another way than payment.

Held, that this offer was evidence of an admission of liability amounting to waiver of notice.

Though the declaration alleged notice and the evidence only proved waiver of notice the Court refused to disturb the verdict or to deprive plaintiffs of their right to costs.

LEMAY v. CHAMBERLAIN.

Libel—Privileged communication—Nominal damages—New trial refused.

The defendant published of and concerning the plaintiff, a business man, in a written circular called "Legal Record, Co. Renfrew," a statement meaning that the plaintiff had given a chattel mortgage on his property, whereas he had only assigned a chattel mortgage held by him against another person.

Held, statement libellous and not privileged. The jury having found no damages, a rule *nisi* for a new trial was refused without costs.

Delamere, for the motion.

Arnoldi, contra.

McKAY v. CRAWFORD.

Malicious arrest—Order for arrest not set aside—Failure of action.

In an action for malicious arrest and in trespass for arrest,

Held, per Armour and O'Connor, JJ., that the claim for malicious arrest could not be maintained, because the order directing the arrest had not been set aside.

Per Wilson, C.J. It did sufficiently appear that it had been set aside.

Dickson, Q.C., for the motion.

Osler, Q.C., and *Burdett*, contra.

[O'CONNOR, J.]

REGINA v. GRAVELEE.

Municipal Corporation—By-law—Consolidated Municipal Act, 1883, sec. 503, sub-sec. 6—Conviction quashed.

A by-law under sub-sec. 6, sec. 503, Consolidated Municipal Act, 1883, and conviction thereunder were held not bad for not embodying or referring to the exceptional proviso as to time mentioned in sec. 500, for this section does not refer to the subject of sub-sec. 6 of sec. 503, and apart from that, sec. 500 is expressly limited to municipalities in which no market fees are imposed, whereas here there were such fees.

Such by-law is not *ultra vires*, express power being given by sec. 503 to pass a by-law respecting the matters mentioned in sub-sec. 6.

Held, also, that as the question of reasonable or unreasonable exercise of the power could only be entertained on a motion to quash the by-law, the objection was not open on this motion, which was to quash the conviction. But,

Held, that the conviction was bad for imposing but one penalty while covering two several and distinct offences.

Clement, for the motion.

James MacLennan, Q.C., contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT.]

Re MCINTYRE AND SCHOOL TRUSTEES OF BLANCHARD

Public Schools—Dismissal of scholar—Action—Mandamus.

On 3rd December, 1884, a public school teacher dismissed the plaintiff, a boy of thirteen years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was brought before the school trustees and a meeting of the trustees held and action taken in the matter, but a subsequent meeting was held, only two of the trustees being present, the third trustee not having been notified, when they decided that the boy could return to school when he expressed regret to the teacher for his misconduct. The boy then returned to the school, but did not apologize. He remained there for several days without being interfered with, but the teacher did not give him any instruction. It did not appear that the teacher was acting under instructions from the trustees. In an action in the Division Court against the school mistress and trustees, the Judge dismissed the action against the school mistress but held the trustees liable.

Held, on appeal to the Divisional Court, that the trustees were not liable.

Smith, for the appeal.

Shepley, for the defendant.

MASSIE v. TORONTO PRINTING COMPANY.

Libel—Excessive damages—New trial.

Action for libel. The libel consisted in letters published in the defendants' newspaper reflecting on the plaintiff as warden of the Central Prison. The defendants refused to give the name of the writer of the letters, and so assumed the responsibility. The jury found for the plaintiff with \$8,000 damages. The Court under the circumstances directed the verdict to be reduced to \$1,000 with costs, if paid before 1st April and the plaintiff elected to take such amount, but if not then paid by defendants, the order should be discharged. If plaintiff did not so elect, a new trial was directed with costs, to be paid by defendants.

W. Nesbitt, for the plaintiff.

O'Donohoe, Q.C., for the defendants.

McROBERTS v. STEINHOFF.

Fraudulent conveyance—Intent—R. S. O. cap. 118—47 Vict. cap. 10, sec. 3 (O.)

When there is a *bona fide* debt secured by a chattel mortgage given thereon, the mortgage cannot be avoided by simply showing that the debtor was insolvent, and intended to give the mortgagee a preference. To avoid the transaction under R. S. O. cap. 118, there must be a concurrence of intent on the part of the debtor and the creditor taking the mortgage; and the amendment made by 47 Vict. cap. 10, sec. 3, does not affect the matter.

Shepley, for the plaintiff.

W. H. Meredith, Q.C., for the defendant.

McCONKEY v. CORPORATION OF BROCKVILLE.

Municipal corporation—Flooding of cellar—Private drain connecting with street drain—Notice—Liability.

Action against the defendants for the flooding of the plaintiff's cellar by the stoppage of a drain, whereby the water and filth from the sewers of private houses and the surface from the street passing down the drain

were dammed back through plaintiff's drain upon his premises. The obstruction was caused by a private individual, S., who had a drain connecting with the street drain which was not known to the defendants, but was known to the plaintiff; and though he complained to some members of the corporation of the water, etc., being backed up, did not inform of the nature of the obstruction. The drain was a covered drain running under the sidewalk for a considerable distance, the end of the drain being near plaintiff's premises, but not extending so far as this; and he connected his private drain therewith. There was no by-law requiring property owners to drain their premises into the drain, and their use of it was entirely voluntary. There was no complaint as to the insufficiency of the drain or as to the manner of its construction.

Held, that the defendants were not liable.

Arnoldi, for the plaintiff.

Moss, Q.C., and *Edmund Reynolds*, for the defendants.

GRAY v. CORPORATION OF DUNDAS.

Municipal corporation — Sewer connecting with creek — Fouling creek — Liability.

The defendants had a drain on Main street, in the town of Dundas, for carrying off the surface water of the street, along and across the street, and then through private property until it reached a creek. Certain screw works were carried on on Main street near where the drain was. The proprietors of these works obtained permission to connect with the defendants' drain. Complaints being made of the drain being fouled by noxious matter from the works, the proprietors used an old cellar as a reservoir to contain the noxious matter from the works that had been formerly carried off by their drain. The noxious matter from the cellar, it was alleged, filtered through from the cellar into the drain and was thus carried into the creek. The drain, without the infiltration into it from the cellar, from which it is distant 26 feet, would not convey anything injurious into the creek. The plaintiff was a riparian proprietor on the creek, and had a factory thereat, and brought an action against the defendants for the alleged fouling of the waters of the creek, whereby the plaintiff was prevented from using the waters of the said creek for domestic purposes and for his said factory.

Held, that the action was not maintainable.

Lount, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

MCGIBBON v. NORTHERN AND N. W. R. CO.

Railway—Fire caused from engine—Evidence.

Action for negligence against the defendants in the conduct of their engine, whereby, as alleged, fire escaped therefrom and destroyed the plaintiff's property. It appeared that the engine passed the plaintiff's stable and combustible manure heap. It was urged that the effect of putting on steam was to cause a larger quantity of sparks to pass through the netting of the smoke stack; but there was no evidence to show that a larger quantity of sparks did escape, or that the fire was caused thereby. It was further urged that the fire was caused from the ash-pan; and in evidence thereof a cinder too large to come from the smoke-stack was produced, picked up on the manure heap; but it did not clearly appear whether the cinder was from coal or wood, the engine burning coal. The fire that broke out in the manure heap was put out, and about four minutes afterwards a fire broke out in a barn adjoining the plaintiff's, and consumed both. No evidence was given of any faulty construction in the engine; but it was shown to be of approved make, with proper appliances to prevent as far as possible the escape of fire.

Held, Rose, J., dissenting, that there was no evidence of negligence to go to the jury; and that the case was properly withdrawn from the jury.

Lash, Q.C., for the plaintiff.

D'Arcy Boulton, Q.C., for the defendants.

INTERNATIONAL WRECKING AND TRANSPORTATION CO.
v. LOBB.*Salvage—High Court—Jurisdiction—Admiralty—Rules—Services performed on request—36 Vict. cap. 54 (D.).*

The schooner *Huron* was stranded on the northern shore of Lake Erie. The master telegraphed to the manager of a wrecking company at Detroit for tugs and wrecking apparatus. With their assistance the schooner was rescued and brought into a safe port. This action was then brought in this Court to recover an amount, made up chiefly of per diem charges for the tugs and apparatus, which exceeded the value of the vessel.

Held, that the action was a salvage action, and that the Admiralty rules as to salvage awards and apportionment thereof applied, though the action was brought in the High Court; that the maximum salvage

award is a moiety of the *res* saved; and that wrecking companies are governed by the law of salvage as well as ordinary vessel owners.

Held, also, that the services were no less salvage because performed upon request.

J. K. Kerr, Q.C., and Moss, Q.C., for the plaintiffs.

Osler, Q.C., and R. Gregory Cox, for the defendant.

CANADA ATLANTIC R. W. CO. v. CAMBRIDGE.

By-law—Bonus—Aid to Dominion Railway—Promulgation—Effect of—Clerk casting vote—Majority of electors—Advertisement—Engineer's certificate.

A by-law was passed by the defendants granting aid to plaintiffs' railway—a Dominion railway. The vote for and against the by-law was equal, and the clerk gave a casting vote in favor of the by-law, and it was then finally passed by the council. There was no resolution passed by the council designating the paper in which the notice was published, but the paper was the one usually employed for such purpose, and the account rendered therefor was passed and paid by the council:

Held, following the judgment of Proudfoot, J., in *Canada Atlantic v. Corporation of Ottawa*, that under sec. 559, sub-sec. 4, of the Municipal Act, R. S. O. cap. 174, (sec. 628 of Act of 1883,) a grant by way of bonus may be made to a Dominion railway.

Held, also, that the promulgation of a by-law, though validating any defect in the form or substance of the by-law, does not affect a matter not within the proper competency of the council to ordain; and therefore would not apply to cure the defect of the council finally passing a by-law which had not received as required a majority of the votes of the electors: but,

Held, there was a majority in this case, as the clerk had the right to give the casting vote.

Held, also, the advertisement was sufficient.

It was objected that the work had not been performed, and that a certificate to that effect given by the engineer was untrue; but,

Held, that not only did the evidence not sustain the objection, but the question was for the engineer and he had given his certificate.

McCarthy, Q.C., and Chrysler, for the plaintiffs,

MacLennan, Q.C., for the defendants.

[THE DIVISIONAL COURT, 6TH MARCH, 1886.]

SCOTT v. CRERAR.

Libel—Publication, evidence of—Nonsuit.

Action for libel. The libel was contained in certain letters or circulars written on a type-writer sent to several members of the legal profession in Hamilton, imputing unprofessional conduct to the plaintiff in sending "bummers" around touting for business, and inducing the clients of other solicitors to leave them and employ the plaintiff's firm. There was no direct evidence to show that the defendant was the writer; and the plaintiff relied on circumstantial evidence as proving the fact. As part of the plaintiff's case the defendant's examination before trial was put in by the plaintiff, which examination contained a denial by the defendant that he was the writer.

Held, Rose, J., dissenting, that on the evidence, as set out in the case, there was not sufficient to go to the jury to prove that defendant was the writer, and that a nonsuit was properly entered.

McCarthy, Q.C., for the plaintiff.

Robertson, Q.C., and *Mackelcan, Q.C.*, for the defendant.

In re THE MASSEY MANUFACTURING CO.

Company—Increase of capital stock—Notice by Provincial Secretaries—Ministerial act—Mandamus.

An application was made by the Massey Manufacturing Company to the Provincial Secretary for the issue of notice under his signature pursuant to sub-sec. 18 of sec. 5 of 27 and 28 Vict. cap. 23, for publication as required by said Act, the application stating that a by-law of the company had been passed increasing the capital stock thereof by \$300,000, making the total capital stock \$500,000, and declaring the number and amount of the shares of the new stock to be 30,000 shares of \$100; that none of the said stock had been subscribed for, and nothing paid thereon. A duly authenticated copy of said by-law was filed on the application with the Provincial Secretary.

Held, that the duty of the Provincial Secretary in the matter on the issuing of the notice was ministerial; and that on the requirements of the statute being complied with the Provincial Secretary had no discretion in the matter, but must issue the notice.

Held, also, that the proper mode of enforcing the issue of the notice is by mandamus.

Robinson, Q.C., and *Lash, Q.C.*, for the applicants.

Irving, Q.C., for the Provincial Secretary.

McCarthy, Q.C., and *Neville*, for the dissatisfied shareholders.

DYMENT v. NORTHERN & N. W. RAILWAY CO.

Parol evidence—Admissibility—Consignor and consignee—Which has right to sue—Costs.

The plaintiff's agent at Gravenhurst shipped two car loads of shingles on defendants' cars. The shipping bill, signed by the agent, was in the usual form, and requested defendants to receive the under-mentioned property in apparent good order, addressed to "N. Dymont" (the plaintiff), "Wyoming, to be sent subject to their tariff, etc." Then, in the appropriate columns, followed the description of the shingles.

| | | |
|--------|---------------------------|---------------|
| " 3873 | Shingles | 80 m. |
| | G. T. R. | |
| | To Henry James, Mitchell. | |
| 8208 | Shingles | 80 m. |
| | (Sd.) | Chas. Brown." |

Parol evidence was admitted to show that the meaning of the shipping bill was that the first-named carload was to go to plaintiff at Wyoming, and the other to Henry James, at Mitchell; and that the agent so told the defendants' station agent when shipping the goods.

Held, that the evidence was properly admitted.

An objection was taken in term that the action should have been brought by the consignee James, because, as was alleged, the evidence showed that the property had passed to him; but the objection was not raised at the trial or on the pleadings; and if it had been made it would have been shown that the property was still in the plaintiff; and in any event the consignee James consented to be added as a co-plaintiff.

Held, that the objection could not now be raised; but even if there were anything in it, the Court would allow James to be added as a co-plaintiff.

At the trial, the learned Judge only allowed County Court costs. On showing cause to the defendants' motion, the plaintiff, who had not moved, asked to have the direction as to costs varied and full costs allowed.

The Court, under the circumstances, refused to interfere.

McCarthy, Q.C., and *Pepler*, for the plaintiff.

D'Arcy Boulton, Q.C., for the defendants.

CARTER v. GRASETT.

Easement—Light and air—Implied grant—Equity of redemption.

P., the owner of lots 8 and 9, by his will devised the same to trustees in trust to sell. In 1869, the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9 immediately adjoining it to the north, the said lot 9 being then open and not built upon. In 1873, the trustees sold lot 9 to Mrs. Priestman, who sold to T., who erected a house thereon. T. sold to G., under whom defendant claimed title. At the time P. became the owner of lot 9, he did so subject to a mortgage thereon, and he continued at the time of his death to have only an equity of redemption therein. The mortgage was discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the right to the light and air to the said windows, and that the same had been infringed upon by the erection of the house by T.; and he brought this action claiming damages and an injunction.

Held, that, by reason of P.'s trustees, at the time they sold to plaintiff, only having an equity of redemption in lot 9, no such implied grant to light and air could arise.

McCarthy, Q.C., and *G. Bell*, for the plaintiff.

Robinson, Q.C., for the defendant.

PIRIE v. WYLD.

Letters written without prejudice—Admissibility.

Letters written or communications made without prejudice, or offers made for the sake of buying peace or to effect a compromise, are inadmissible in evidence, it being considered against public policy as having a tendency to promote litigation and to prevent amicable settlements; but it may be said that no ground of public policy requires that a letter written to intimidate containing an admission should be held inadmissible.

Where a letter, written without prejudice, was deprecatory and complaining rather than abusive or with the object of intimidating, and written for the purpose of expressing the writer's views on the matter of litigation, and contained offers of settlement or compromise, it was held to be inadmissible.

G. T. Blackstock, for the plaintiff.

McCarthy, Q.C., contra.

[O'CONNOR, J.]

GORING v. LONDON MUTUAL INSURANCE COMPANY.

Insurance—Variation of statutory conditions—Fire Insurance Policy Act—Mutual Insurance Company—Attorney-General—Minister of Justice.

The defendants, a mutual insurance company, were incorporated by an Act of the Dominion Parliament, 41 Vict. cap. 40, by sec. 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant, or his circumstances, or the concealment of any encumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto, shall render the policy void."

Held, on demurrer, that the matters provided for by the above section were subject matters of the "Fire Insurance Policy Act" of Ontario, and over which the Province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act *per se*, but only by being used as required or modified by said Ontario Act, namely, in the manner provided for variations to the conditions therein contained.

Citizens Insurance Company v. Parsons, and *Queen's Insurance Company v. Parsons*, 7 App. Cases 96, commented upon.

The 28th section of the Mutual Fire Insurance Companies Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the Act respecting Mutual Fire Insurance Companies are expressly inconsistent with or supplementary," and in addition to the provisions of the Fire Insurance Policy Act.

Held, this includes all Mutual Insurance Companies doing business in the province; and it was not alleged in the pleadings herein that there was anything in the defendant's Act "expressly inconsistent with" the Fire Insurance Policy Act, but merely that the matters were variations, &c., of the statutory conditions.

Held, also, that the question, so far as raised, was not of a constitutional character, so as to require notice to the attorney-general of the Province and the minister of justice of the Dominion.

Osler, Q.C., for the plaintiff.

Moss, Q.C., for the defendants.

[O'CONNOR, J.]

FUNSTON v. CORPORATION OF TILBURY EAST.

Municipal Corporation—Drainage by-law—Revision of assessments by Court of Revision—Necessity for alterations in by-law—Locus standi—Motion to quash, whether to Divisional Court or single judge.

In a drainage by-law the assessments as made by the engineer and contained in the schedule to the by-law were revised by the Court of Revision

and alterations made; but the by-law was not amended before being finally passed, so as to correspond with such alterations, as required by section 571, sub-section 2, of the Municipal Act of 1883, it being impossible to discover from the alterations as made the amount of the "total special rate" against each lot or part of lot, and therefore the amount to be annually levied, which is to be ascertained by dividing such total special rate by the number of years the by-law has to run, which in this case was fifteen years.

Held, that the defect was fatal to the by-law.

The *locus standi* of the applicant herein was objected to, but on the evidence the objection was overruled.

In moving to quash a by-law, the practice having been adopted of applying to a judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained. Such an application, if required to be made to the Divisional Court, must be to a common law Divisional Court and not to the Chancery Divisional Court.

Pegley, for the applicant.

Moss, Q.C., contra.

Re DUNN AND CORPORATION OF PETERBOROUGH.

Municipal law — Manufactories — Exemption — Public policy — Municipal Act, 1883, sec. 368 — 47 Vict. cap. 32, sec. 8 (O.)

The Municipal Act of 1883, sec. 368, as amended by 47 Vict. cap. 32, sec. 8 (O.), authorizes a Municipal Council to exempt any manufacturing establishment, in whole or in part, from taxation for any period, not longer than ten years.

A by-law of the town of Peterborough recited that a company had acquired several water privileges on the river Otonabee and intended developing same by erecting thereon factories of different descriptions; and it was advisable, in the interests of the town, that the privileges, immunities, and exemptions thereafter mentioned should be granted. It further recited that the total assessment of the said water privileges and the lands in connection therewith amounted to \$50,000. The by-law then enacted that the aggregate assessment of the said properties should be and remain for ten years at the sum of \$50,000, and the assessors from time to time were required to assess same at said sum, notwithstanding the erection of any buildings, etc., thereon.

Held, not a by-law within the said section as amended; and also that it was opposed to public policy and morality in directing the assessors from time to time to limit their assessment.

Shepley, for the applicant.

Robinson, Q.C., and *Edwards*, for the defendants.

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VOL. VI.

APRIL, 1886.

No. 5.

FRAUDULENT AND COLLUSIVE JUDGMENTS.

A JUDGMENT obtained by fraud is as to persons defrauded a nullity. Fraud vitiates everything. Persons defrauded may be either parties to the action in which the judgment is recovered, or strangers. As to parties to the action, it is obvious that if they have in any way participated in the fraud, or have by fraud and collusion for some ulterior purpose facilitated the recovery of a judgment against themselves, they are not persons defrauded. No man has a right to set up his own fraud in order to relieve himself of the consequences thereof. It follows therefore that if A., in order to defraud his creditors, has enabled B. to recover judgment against him for a sum of money not justly due by him to B., he cannot be relieved by any court of justice from the consequences of that judgment. *Nemo allegans suam turpitudinem est audiendus* (a). The result would be different if a creditor were the party complaining. He would be a person defrauded.

As a general rule, however, every judgment is binding and conclusive as against parties and privies, of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground

(a) *Prudham v. Phillips*, Ambl. 763. See also *Mundell v. Tinkiss*, 6 Ont. R. 625.

poral, to the case of a judgment *in rem*, such judgments are valid against all the world except parties who may impeach them for fraud.

Strangers may always set up the nullity of a judgment on the ground of fraud in any collateral proceeding, whether in the same court or any other (*h*).

With regard to strangers, further questions also arise where the parties to an action have colluded together for the purpose of defrauding third parties. For the protection of creditors and others, various Acts have been passed providing for the more convenient enquiry into such judgments.

It is proposed to consider, in the first place, the question of fraud independently of collusion.

Definitions of fraud.—Courts and lawyers have always refrained from any attempt to define with exactness what constitutes a fraud. Generally it may be said to be every kind of artifice employed by one person for the purpose of deceiving another.

In no case respecting judgments have the Courts attempted to lay down any rule as to what would constitute such a fraud as would induce them to vacate a judgment. Some of the probable elements in such cases may, however, be pointed out.

(*a*) It should be something extrinsic and collateral practised in the very act of obtaining the judgment, and not a fraud in the matter in which judgment was rendered (*i*).

(*b*) Some positive trick, artifice, or deceitful practice should be established, and it should be shown to have misled the Court or the opposite party on a material point. A fraud by which no one is deceived is harmless.

(*c*) If a misstatement by the successful party is relied upon it should be shown to have been false to his knowledge, or to have been made recklessly and without caring whether it was true or false.

(*h*) *Kerr on Fraud and Mistake*, 327.

(*i*) *U. S. v. Throckmorton*, 98 U. S. 61; *Marquez v. Frislie*, 101 U. S. 473; *Zellerbach v. Allenberg*, 7 Pac. Rep. 908; 21 Cent. L. J. 467.

(d) If a concealment of a material fact is relied upon it should be shown that the withholding of that which was not stated made that which was stated absolutely false, or that the withholding thereof was an implied representation that it did not exist (j).

(e) A misstatement or concealment should be shown to have been made or resorted to for the dishonest purpose of deceiving the Court or the opposite party (k).

Fraud in the Court itself may occur (i) where the persons composing the Court are really the successful parties sitting upon and deciding their own case (l); (ii) where the Court wilfully and for a dishonest purpose disregard the law applicable to the case (m); or (iii) where the procedure adopted by the Court is contrary to natural justice (n).

Contrivances to give jurisdiction.—If by a contrivance of the plaintiff the defendant has had no opportunity to appear in a foreign Court, the judgment will not be enforced against him (o). If by fraud or collusion apparent jurisdiction has been conferred the judgment will not be binding (p). The defendant must shew that the false allegation was unknown to him before judgment (q).

Frauds upon the judgment debtor.—If the defendant has been prevented from taking proper precautions to defend by the fraudulent assurance of the plaintiff that no defence was necessary, or that the suit would be carried no further, the defendant will be relieved against the judgment (r).

If the successful party prevents his opponent from exhibiting fully his case, as by keeping him away from

(j) Per Lord Cairns, *Peck v. Gurney*, L. R. 6 H. L. at p. 403.

(k) *Weir v. Bell*, 3 Ex. Div. 238, 243.

(l) *Price v. Denhurst*, 8 Sim. 279. See also *Cammell v. Sewell*, 3 H. N. 646; *Duries v. Proprietors Grand Junction Canal*, 3 H. L. C. 759.

(m) *Castrique v. Imrie*, L. R. 4 H. L. 445, 448.

(n) *Cranley v. Isaacs*, 16 L. T. N. S. 529; *Simpson v. Fogo*, 6 Jur. N. S. 949; 9 Jur. N. S. 403.

(o) *Castrique v. Behrens*, 30 L. J. Q. B. 163.

(p) *Demeritt v. Lyford*, 27 N. H. 541.

(q) *Crim v. Handley*, 94 U. S. 652; *Cragin v. Lovell*, 109 U. S. 194. See *Greene v. Greene*, 2 Gray (Mass.) 361.

(r) *Earl of Oxford's Case*, 1 Ch. R. 1 (13 Jac. 1); W. & T. L. C. vol. 2, p. 590.

Court or by a false promise of a compromise, or by keeping him in ignorance of the suit; or by procuring a solicitor to assume without authority to represent him and connive at his defeat, or by colluding with the regularly employed solicitor to sell out his client's interests; in each of these and similar cases an action may be maintained to set aside and annul the judgment and open the case for a new hearing (s). If a judgment were founded on a consent obtained by fraud the Court would treat the consent as a nullity (t).

The recent case of *Abouloff v. Oppenheimer* (u), has apparently opened a wide door for the admission of evidence tending to prove fraud in an action upon a foreign judgment, and if the dicta of the various Judges in that case are acted upon, there may be few cases in which, under the pretence of examining into the alleged fraud, a re-examination of the merits will not take place. The judgment was for the return of certain goods of the plaintiff or the payment of their value. It was originally pronounced by the District Court of Tiflis in the Empire of Russia, and was affirmed on appeal by the High Court of Tiflis. The fourteenth paragraph of the defence in the English action set out that "if the said judgments or either of them were obtained as alleged (which is not admitted), the same and each of them were obtained by the gross fraud of the plaintiff and her husband Gregor Melcoevitch Abouloff, acting in collusion with her, in fraudulently representing to the said District Court of Tiflis and the said High Court of Tiflis, that the goods in question were not in the possession of the plaintiff and her husband at the time the said suit (if any), which is not admitted) was commenced, and at the time the said judgment (if any) was given, and during the whole time the said suit (if any) was depending, and by fraudulently

(s) *U. S. v. Throckmorton*, 98 U. S. 61; *Pacific Ry. Co. of Miss. v. Missouri Pac. Ry. Co.*, 111 U. S. 505. See also *Carew v. Johnston*, 2 Sch. & Lef. 308; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Kent v. Richards*, 3 Md. Ch. 392; *De Louis v. Meek*, 2 Iowa, 55.

(t) *Stannard v. Harrison*, 19 W. R. 812.

(u) 10 Q. B. D. 295.

concealing from the said courts that the whole of the said goods were, as the fact was, and as the plaintiff and her said husband well knew at the time the said suit (if any) was commenced, and during the whole time it was depending, and at the time of the alleged judgment, in the actual possession of the plaintiff and concealed by the plaintiff and her said husband, except as to so much of the goods as the plaintiff and her said husband had from time to time secretly and fraudently disposed of." The plaintiff demurred to this paragraph. The allegations charge obviously wilful and corrupt perjury in the plaintiff and her husband. For the purposes of the argument the demurrer of course admitted the truth of the allegations. The Divisional Court (Matthew and Cave, JJ.) sustained the defence and overruled the demurrer, and this decision was affirmed by the Court of Appeal (Lord Coleridge, C.J., and Baggallay and Brett, L.JJ.) The judgment of the Divisional Court is not reported. In the Court of Appeal the Judges founded their decision almost entirely on the dictum of Chief Justice De Grey in the *Duchess of Kingston's case* (*v*). "Like all other acts of the highest judicial authority it is impeachable from without; although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled." The word "misled" in this dictum forms the keystone of all the judgments. It would be a startling proposition that if a plaintiff obtained a judgment in any Court, domestic or foreign, by perjury of which he was afterwards convicted, he could, notwithstanding that conviction, prevent the perjury from being set up either in attacking the judgment or in defending an action founded upon it. What difference is there when he admits the perjury? While some courts and text-writers have gone so far as to assert that perjury in obtaining a judgment cannot be set up in answer to the judgment (*w*), no case has been found in which the plaintiff had actually been convicted of or had admitted the perjury. If the judgment of the Court of Appeal is correct, it can

(*v*) 11 Harg. St. Tr. 261; 20 How. St. Tr. 278-9; 2 Sm. L. C. 794.

(*w*) See *Bigelow* on Fraud 173; *Bigelow* on Estoppel, 165.

be supported upon the short and simple ground that the plaintiff had admitted that the foreign judgment was recovered by her own perjury. It is with the speculative part of the judgments that fault may be found. The question of what evidence was admissible in order to prove the fraud was in no sense before the judges. The inference to be drawn from all the judgments and the plain statement in one of them is that all the evidence given in the foreign court may be given *de novo*, and from that evidence the English Court of first instance may find that the District Court and High Court of Tiflis were misled. Baggallay, L.J., said, "If all the facts from which the fraud is to be inferred had been before the Foreign Court, and that court did not infer fraud from them, and if an English Court was called upon to give effect to the judgment obtained by the person who perpetrated the fraud, I should be prepared to hold that the foreign judgment could not be enforced in the English Court" (x).

It must be borne in mind that the Court fully recognized that the English Courts could not inquire whether the Foreign Courts had been mistaken and that the English Courts could not re-examine the merits. Brett, L.J., pointed out that these principles had no application, because the issue in the English Courts was not the same as that in the Foreign Court. He said the issue in the Russian Courts was whether the defendants were wrongfully detaining the goods of the plaintiff; while in the action then before them the issue was whether the judgment was obtained by the fraud of the plaintiff successfully perpetrated on those Courts (y). These remarks were directed more at the evidence by which the fraud was to be proved than to the question then before the Court. They can only be considered therefore as mere *dicta*. Lord Esher's remarks might be paraphrased thus: "The issue in the Russian Courts was whether the plaintiff or the defendant should be believed on the question of who had the

(x) 10 Q. B. D. 304.

(y) 10 Q. B. D. 307.

goods. The Courts believed the plaintiff. The question raised now is whether the plaintiff committed perjury in the Russian Courts, i. e., whether the defendant or the plaintiff should now be believed. They are different issues, although the evidence to prove the one is the same as that to prove the other." It was long ago settled that an erroneous view of the facts taken by a Foreign Court is no ground of dispute to the judgment (z). The Courts every day refuse on appeals in cases where there has been a conflict of evidence to disturb the decision of a competent tribunal on the facts (a). To refuse to give the same effect to the decisions of foreign tribunals on questions of evidence, as to those of our own, is to apply the doctrine of comity (if there is really any such doctrine) on purely arbitrary principles, subject to change by any Judge at his mere caprice, and not according to settled principles of law. The *dicta* in *Abouloff v. Oppenheimer* do not appear to be consistent with the authorities. As James, L.J., said in *Flower v. Lloyd* (b), "Where is judgment to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action, on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process, had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or the other wilfully and corruptly perjured."

In a very early case (1702), a bill in equity was brought for a new trial of an action at law, on the ground that the principal witness was partner in interest with the other side. Lord Keeper Wright said, "New matter may in some cases be ground for relief, but it must not be what was tried before, nor when it consists in swearing only will I ever grant a new trial, unless it appears by deeds or

(z) *Scott v. Pilkington*, 2 B. & S. 11.

(a) *Slattery v. Dublin, Wicklow and Wexford Ry.*, 3 App. Cas. 1155.

(b) 10 Chy. Div. 333.

writing, or that a witness on whose testimony the verdict was given was convicted of perjury or the jury attainted" (c).

It would not be an unreasonable rule to lay down that where a competent tribunal having jurisdiction had found on the facts, and where the only defence to the action on the judgment was perjury, the only evidence admissible in support of the defence would be either a conviction for such perjury or an admission that it had been committed and had formed the foundation of a judgment.

The plaintiff may be unable, especially in a foreign country, to produce the witnesses who supported his story originally, or some of them may have since died (d). The taking of all the evidence over again is unfair, unjust, and contrary to the maxim, *Interest reipublicæ ut sit finis litium*. In a New York case where the defendant set up that the judgment had been procured through subornation by the plaintiff, and where it appeared that the perjury (if any) was on a point which the defendant knew would be investigated, Chancellor Kent refused relief, relying upon the English decision of *Tovey v. Young* (e). That decision was also quoted with approval by the United States Supreme Court in *U. S. v. Throckmorton* (f). Indeed the American cases lay down the broad doctrine that if the fraud was or ought to have been tried in the original action it cannot be set up again (g).

Even the decision in *Abouloff v. Oppenheimer* itself seems somewhat at variance with that of a very strong Court composed of Cockburn, C.J., Wightman, Crompton and Blackburn, JJ., in *Castrigue v. Behrens* (i). The action was for conspiring to deprive the plaintiff of his interest in

(c) *Tovey v. Young*, Pre. Ch. 193.

(d) *Qu.* If the plaintiff's story had originally been corroborated, could it be said that the Court relied on the plaintiff's testimony, and that his fraud induced the judgment?

(e) *Smith v. Lowry*, 1 Johns. (N. Y.) Ch. 320.

(f) 98 U. S. 61.

(g) *Greene v. Greene*, 2 Gray (Mass.) 461 (Shaw, C. J.); *Blanchard v. Brown*, 3 Wall. (U. S. S. C.) 245; *Adams v. Adams*, 51 N. H. 388.

30 L. J. Q. B. 163; 7 Jur. N. S. 1028.

a ship by falsely and fraudulently procuring it to be represented to the French Courts, in an action *in rem* against the ship, that one Troteux was the holder for value of a Bill of Exchange, when he was not. On demurrer to the declaration the Court held it bad, for it was consistent with its averments that the plaintiff had notice of the proceedings in France, and purposely allowed judgment to go by default, or even that he appeared in the French Court, intervened, and was heard, and that the very question whether Troteux was a holder for value was there decided against him. As the French action was determined against the plaintiff, the action for conspiracy being of the nature of an action for malicious prosecution, the action was not maintainable in any event, and the decision may be supported on that ground.

Frauds upon the Court itself.—Where upon an *ex parte* false statement a Court has pronounced a judgment relief will be given (*j*). If fraud is made use of by either of the parties to an arbitration to mislead the arbitrators the award will be vitiated (*k*).

Fraud in enforcing valid judgment.—If an originally valid judgment has been satisfied, the fraudulent attempt to enforce it will be relieved against (*l*). In the same manner it may be shewn that the original judgment was merely collateral to some other debt or judgment which has been paid or in some way annulled (*m*). If a warrant of attorney to confess judgment is fraudulently acted upon, relief will be given against the judgment (*n*).

Conduct of judgment debtor.—The Court must be satisfied that the conduct of the party himself has not deprived him of his title to relief, and that the relief can be given with due regard to the just interest of others (*o*).

(*j*) *Shedden v. Patrick*, 1 Macq. H. L. C. 535; *White v. Tommey*, 4 H. L. C. 313; *Ex parte Alice Cockerell*, 4 C. P. D. 39.

(*k*) *S. S. Co. v. Bumstead*, 3 Vin. Abr. 140.

(*l*) *Story*, Eq. Jur. secs. 253, 876 (*c*). See *Turcotte v. Dawson*, 30 C. P. 23.

(*m*) *Stannard v. Harrison*, 19 W. R. 812.

(*n*) *Annesley v. Rookes*, 3 Mer. 226 *n*.

(*o*) *Davenport v. Stafford*, 8 Beav. 522.

Purchases under fraudulent judgments.—If a case of fraud be established, the Court will set aside all transactions founded upon it by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been intended to protect them. It is immaterial whether such machinery and contrivance consisted of a decree in equity and a purchase under it, or of a judgment at law or of other transactions between the actors in the fraud (*p*). But if time has elapsed since the transactions complained of and there have been parties who were competent to have complained, the Court will not, upon doubtful or ambiguous evidence assume a case of fraud, although upon fraud clearly established no lapse of time will protect the parties to it or those who claim through them against the jurisdiction of equity depriving them of the effects of their plunder (*q*.)

Degree of fraud necessary.—The fraud must be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion, and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. The mere fact that rights have been overstated is insufficient (*r*). Acts tending possibly to deceive or mislead, without any meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, cannot, at least after long delay, induce a Court to set aside a solemn decree (*s*). The fraud must be the fraud of the party himself (*t*). Where an attorney made a false affidavit on which an Irish judgment was founded, it was held that that fact could form no defence to an action on such judgment, especially when full relief could be obtained in the Irish tribunal (*u*).

(*p*) *Kerr on Fraud and Mistake*, 4 ; *Bowen v. Evans*, 2 H. L. C. 280.

(*q*) *Bowen v. Evans*, 2 H. L. C. 280.

(*r*) *Patch v. Ward*, L. R. 3 Ch. App. 206, 207.

(*s*) *Ibid.* at p. 212.

(*t*) *Abouloff v. Oppenheimer*, 10 Q. B. D. 307.

(*u*) *Crawley v. Isaacs*, 16 L. T. N. S. 529.

Assignee of judgment.—The purchaser of a judgment must take it with its equities, and if it were obtained, or is being enforced, by fraud, it will be set aside even as against him (v).

Remedy, where it should be sought.—Should the Court which has been imposed upon be asked to vary or set aside its own judgment, or should a separate action be commenced or the facts set up as a defence to an action on the judgment?

In *Shedden v. Patrick* (w), the House of Lords decided that in order to set aside for fraud a judgment confirmed by the House the application should be made there.

In *Crawley v. Isaacs* (x), the complaining party was remitted to the original Court.

Lord Esher has said, “In my opinion, a Court of Common Law would have in the exercise of its own jurisdiction set aside a judgment procured from it by deception (y).

In *Flower v. Lloyd* (z), the plaintiff was in a dilemma. V. C. Bacon, before whom the case was tried, decided in his favour, but the judgment was reversed on appeal. The plaintiff alleged fraud by the defendants in concealing certain facts from an expert who testified in the Court below. V. C. Bacon could scarcely, on the ground of fraud practised before him, but which had no effect upon him, practically reverse the Court of Appeal and restore his own decision. The Court of Appeal, however, held that it had no original jurisdiction, but could merely hear appeals, and it was suggested that the plaintiff should bring a new action to vacate the judgment for fraud.

On adopting the suggestion, V. C. Bacon again gave judgment for the plaintiff, but the Court of Appeal considered that no case of fraud had been established and dismissed the action (a).

(v) *Hope Assurance Company v. Edwards*, W. N. 1869, p. .

(w) 1 Macq. H. L. C. 535. See also *White v. Tommey*, 4 H. L. C. 313.

(x) *Crawley v. Isaacs*, 16 L. T. N. S. 529. This was scarcely, however, a case of fraud.

(y) 10 Q. B. D. at p. 305.

(z) 6 Chy. Div. 297.

(a) *Flower v. Lloyd*, 10 Chy. Div. 327.

Where a judgment may be impeached as fraudulent in a proceeding already commenced, independent proceedings for that purpose will not be allowed (*b*). But in all other cases it would seem equally competent to apply in the original tribunal, if it has jurisdiction, or commence a new action (*c*). With regard to foreign judgments the rule is firmly settled that fraud by the party setting them up vitiates them, and it is unnecessary to apply to the original Court for a reversal (*d*). Injunctions are frequently granted restraining parties who have obtained judgments by fraud from availing themselves thereof (*e*). The rule is the same, whether the judgment has been pronounced by a domestic or a foreign tribunal.

The allegations of fraud must be specific, pointed and relevant, setting out distinctly the particulars of the fraud, names of parties engaged in it, and the manner in which the Court or party was imposed upon or misled (*f*). The fraud must be established before the propriety of the decree can be investigated (*g*).

The judgment is that the parties are to be restored to the position they were in before the fraud was perpetrated (*h*).

If the reversal by a court of appeal has been procured by fraud the order of reversal is discharged and the original judgment stands (*i*). If a judgment is fraudulent in part it is void *in toto* (*j*).

(*b*) *Knox v. Travers*, 23 Gr. 41; *Ochsenbein v. Pasheller*, L. R. 8 Ch. App. 695.

(*c*) *Earl of Bandon v. Becher*, 3 Cl. & F. 478. See *Williaws v. Preston*, 20 Chy. Div. 672, where solicitor put in fraudulent defence without client's knowledge

(*d*) *Bank of Australasia v. Nias*, 16 Q. B. 717; *Cammell v. Sewell*, 3 H. & N. 646; *Ochsenbein v. Pasheller*, sup.; *R. v. Wright*, 1 P. & B. (New Brunswick) 363; *Magurn v. Magurn*, 3 Ont. R. 570; S. C. 11 App. Rep. 178.

(*e*) *Bowles v. Orr*, J. & C. Ex. 464; *Simpson v. Fogo*, 1 J. & H. 18; 6 Jur. N. S. 949; *Blake v. Smith*, 8 Sim. at p. 303; *Marine Insurance Company v. Hodgson*, 7 Cranch (U. S.) 336.

(*f*) *Shedden v. Patrick*, 1 Macq. H. L. 535; *W. S. v. Atherton*, 102 U. S. 372.

(*g*) *Flower v. Lloyd*, 10 Chy. Div. 327.

(*h*) Ld. Red. 5 Ed. 112, 113; *Flower v. Lloyd*, supra.

(*i*) *White v. Tommey*, 4 H. L. C. 313.

(*j*) *Commercial Bank v. Wilson*, 14 Gr. 473; S. C. 3 E. & A. 257.

Third parties.—No judgment *in personam* is binding upon any one except the parties thereto and their privies. A stranger is not in a position to move to reverse any such judgment or to have the case retried. If his rights have by fraud been prejudiced by a judgment he may impeach the same by independent action, or collaterally in a proceeding then pending or (in some cases) by summary proceedings (*jj*).

“A sentence obtained by fraud or collusion is no sentence. What is a sentence? It is not an instrument with a bit of wax and a seal to it. A sentence is a judicial determination of a cause agitated between real parties upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him, there is no party litigating, there is no party defendant, no real interest brought in question.” So argued Alexander Wedderburn, S.-G. (*k*) in the Duchess of Kingston’s case (*l*). The words quoted have been approved of as law by the House of Lords (*m*), the Privy Council (*n*), and the Ontario Court of Appeal (*o*). A judgment recovered at law by the fraudulent acquiescence of the debtor might formerly have been enquired into in equity, and now by the High Court of Justice (*p*).

The Act 13 Eliz. cap. 5, makes void all feigned covinous and fraudulent judgments devised or contrived to the end, purpose and intent to defeat, hinder and delay creditors.

(*jj*) *Re Youngs, Doggett v. Revett*, 30 Chy. Div. 421.

(*k*) Afterwards Lord Loughborough, L.C., and Earl of Rosslyn.

(*l*) 11 Harg. St. Tr. 261.

(*m*) *Bandon v. Becher*, 3 Cl. & F. 510.

(*n*) *Meddowcroft v. Huguenin*, Moo. 4 P. C. 395.

(*o*) *Magurn v. Magurn*, 11 App. Rep. 181.

(*p*) *McDonald v. Boice*, 12 Gr. 48.

A judgment that in part violates this provision is void *in toto* (q).

Judgments suffered by executors or administrators to defraud or defeat tenants (r), heirs (s), or creditors (r), will be vacated at the instance of the parties defrauded. * If the executor has neglected to plead the Statute of Limitations and the judgment is set aside for fraud, the creditor may do so provided the statute was a bar at the date of the original action (u). A subsequent judgment creditor may attack a prior judgment for fraud (v). A judgment for a penalty obtained in an action brought with defendant's consent after the plaintiff's action for the same penalty, and in order to protect the defendants in respect of such penalty cannot be pleaded in bar to the plaintiff's action (w). Covin and collusion import a trick or contrivance planned by both parties to the transaction which it is alleged is tainted with it to the defrauding and prejudice of another (x). It is not necessary to prove an intention to prejudice or defraud a particular individual; it is sufficient if the intention be to defraud a class of persons of whom the party complaining is one, although he was not known to form one of the class intended to be prejudiced or defrauded (y). If a judgment which by agreement is not to be enforced, be recovered against a party for the purpose of protecting him against the demands of others, the defendant in that action is in substance both plaintiff and defendant, and it is as against strangers no judgment (z). The mere keeping back a witness, though a suspicious circumstance, is not sufficient to presume a fraud. If one party only suppresses evidence

(q) *Commercial Bank v. Wilson*, 14 Gr. 473; S. C. 3 E. & A. 257.

(r) *Bonistiel v. McMaster*, 6 O. S. 32.

(s) *Ward v. McCormack*, 6 O. S. 215; *Lovell v. Gibson*, 19 Gr. 280.

(t) *Johnson v. Waters*, 111 U. S. 640; *Thompson's Appeal*, 57 Penn. St. 175.

(u) *Jardine v. Wood*, 19 Gr. 617. The mere fact of not pleading the Statute would be insufficient; *Re Youngs*, 30 Chy. Div., at p. 429.

(v) *Wilson v. Wilson*, 2 P. R. 374; *Balfour v. Ellison*, 3 P. R. 30.

(w) *Girdlestone v. Brighton Aquarium Co.*, 4 Ex. Div. 107.

(x) Per Thesiger, L.J., 4 Ex. Div. at p. 114.

(y) 4 Ex. Div. 114, 115.

(z) Per Brett and Cotton, L.JJ., 4 Ex. Div. 109-112.

there can be no collusion (*a*). The payment of the costs of the unsuccessful party, the fact that some witnesses were not examined and others not cross-examined, and that difficulties were not interposed which might have been, afford no proof of fraud and collusion (*b*). Where an adopted son had recovered judgment in the Mayor's Court against garnishees for an alleged debt due him by his adopted father, the Court of Chancery restrained the payment by the garnishees, directed the money to be paid into Court, and ordered other creditors to be paid out of it, on the ground that the judgment in the Mayor's Court was based upon a fraudulent claim (*c*).

A Court of Bankruptcy may enquire into the consideration for a judgment debt (*d*). Where a plaintiff having no *bona fide* claim against defendants, but knowing circumstances which would prevent them from submitting to cross-examination, obtained a consent verdict against them, the Court of Appeal characterized it as a "dishonest judgment obtained by dishonest pressure," and refused to allow it to form the basis of proof of a claim in bankruptcy (*e*). That the judgment is forty-two years old and the witnesses dead ; that there have been no assets for distribution during the delay, and that the debtor included the judgment as a liability in his statement of affairs, will not prevent the Court from rejecting the proof (*f*).

Procedure.—If the collusive judgment is set up as a right of action or defence against a stranger, the stranger will on proof of the collusion be entitled to succeed notwithstanding the judgment. In all collateral proceedings the judgment will be treated as a nullity ; *e. g.* (*a*) the Crown will not be bound by a collusive decree of divorce in an action of bigamy ; (*b*) an informer may recover penalties notwith-

(*a*) *Meddowcroft v. Huguenin*, 4 Moo. P. C. 396. See *Fowler v. Hendry*, 7 C. P. 350.

(*b*) *Perry v. Meddowcroft*, 10 Beav. 122. See *Re Youngs*, 30 Chy. Div. at p. 432.

(*c*) *Shand v. De Buisson*, L. R. 18 Eq. 283.

(*d*) *Ex parte Kibble, in re Onslow*, L. R. 10 Chy. App. 373.

(*e*) *Ex parte Banner, in re Blythe*, 17 Chy. Div. 491.

(*f*) *Ex parte Revell, in re Tollemache*, 13 Q. B. D. 720. The Court refused leave to appeal to the House of Lords, W. N. 1884, p. 250.

standing a prior collusive recovery; (c) a shareholder of a company whom it is sought to charge on a judgment against a company may escape liability by proving fraud and collusion (g).

An execution creditor asserting that the judgment on which a prior execution is issued was procured by fraud, might before the Creditors Relief Act notify the Sheriff who might then apply to the Court for relief under the Interpleader Act (h).

Summary Proceedings. — Formerly the Absconding Debtors Act (i) provided for the setting aside of a prior fraudulent or collusive judgment on the application on any writ of attachment. This provision has however been repealed (j).

An issue may however be directed under the Interpleader Act to determine the validity of a prior execution as against attaching creditors (k).

The Creditors Relief Act (l) provides (m) for the disputing by a creditor obtaining a certificate under the Act. There does not appear to be any provision for disputing summarily a claim under an execution, and sec. 7, sub-sec. 10, making a certificate equivalent to an execution within the Interpleader Act, would not apply, as the execution creditor would be claiming no priority over the certificated creditor within section 10 of the Interpleader Act. Decisions on disputed claims are binding on all creditors, unless obtained by fraud or collusion (n).

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(g) *Phipson v. Earl of Egremont*, 6 Q. B. 587; *Harvey v. Harvey*, 9 App. Rep. 91.

(h) R. S. O. cap. 54, sec. 10; *Wilson v. Wilson*, 2 P. R. 374; *Klein v. Klein*, 7 L. J. 296.

(i) R. S. O. cap. 68, sec. 21. For instances of the application of this section, see *Bergin v. Pindar*, 3 O. S. 574; *White v. Lord*, 13 C. P. 289; *Bevan v. Wheat*, 14 C. P. 51; *Dicksan v. McMahon*, 14 C. P. 521.

(j) 45 Vict. cap. 6, sec. 4, sub-sec. 6 (O.).

(k) *Leech v. Williamson*, 10 P. R. 226; *Standard Insurance Company v. Hughes*, 6 C. L. T. 34.

(l) 43 Vict. cap. 10 (O.); 47 Vict. cap. 10, sec. 2.

(m) Sec. 7, sub-secs. 13—22.

(n) Sec. 19.

EDITORIAL REVIEW.

Unlicensed Practitioners.

We print at another page a communication on this subject. The hardship is not confined to the country. The profession in Toronto, with the exception of solicitors for loan companies, do little or no conveyancing. Estate agents, and others, not only have a monopoly of drawing conveyances, but do quite a thriving business in investigating titles and advising generally.

Five years ago an agitation which had certain reforms for its object was commenced in Toronto, and resulted in the election of four representatives of the junior bar to the bench of the Law Society. This had the effect of stirring up this question from the bottom. The very greatest exertions were made to influence members of the legislature to aid in devising a scheme for the reform of this abuse. A great deal of information was got and a thorough understanding of the subject arrived at.

The Law Society is powerless of itself to do anything but prosecute for contempt any one taking proceedings in any Court without having been admitted as a solicitor. The introduction of a bill in the legislature to give them greater power might result in the Courts being thrown open to the whole public (as was once done in Nova Scotia), instead of the imposition of restrictions upon unprofessional practitioners.

The suggestion of our correspondent is a good one that information should be obtained by the Law Society as to applications by laymen in the Surrogate Courts. A test case might, and ought to, be made in this respect officially by the Society, and after that the profession should be left to initiate complaints in particular cases of offending.

As to the question of conveyancing, though it is not a dead issue with the Law Society, it must be admitted that no great progress towards reformation of the existing abuses has been made. The fear of making matters worse obliges caution in proceeding, but it is hoped that a remedy will some day be devised.

The Manitoba Stamp Tax.

It appears that a bill has been introduced in the Manitoba Legislature intended to provoke discussion as to the best means of repairing the loss to the revenue occasioned by the declaration of the invalidity of the Stamp Act.

Mr. Beverley Robertson in a long letter to the public press of the province proposes that a direct tax should be levied on the unsuccessful litigant in every action. He argues that there would be no apparent difference between such a law and the old law under which the amount of the tax, first paid by the solicitor of the successful party, was charged to the unsuccessful litigant in the bill at the conclusion of the action. He has, however, lost sight of the facts, first, that all non-contentious business, which is no doubt large, would remain untaxed; secondly, in order to carry out the principle, that a tax would have to be levied on the unsuccessful party to every interlocutory motion in which costs were ordered to be paid, for the taxation of costs in the cause would not determine that matter; and thirdly, that the whole scheme is open to the objection that the successful party in the first instance might be the unsuccessful party on appeal, and the uncertainty of who should ultimately pay the tax would make the tax an indirect one within the decision of *Attorney-General v. Reed*, and oust the jurisdiction of the Legislature.

A popular measure it would never be. Under the old system, but few suitors knew how much they paid their counsel and solicitor, and how much they paid to the Government in the shape of a tax. The public were always satisfied that there existed extortion on the part of the solicitor. A tax payable directly to the Crown by a suitor and not through the medium of a solicitor's bill would be

sure to be unpopular and to bring about in a short time a demand for repeal. The public prefer to be taxed indirectly and as the province cannot do that some other source of revenue should be looked for.

The Report of the Hamilton Law Association.

We publish by request a short report of the late meeting of the Hamilton Law Association.

There seems to be a misapprehension as to where the blame, if any, should be placed with respect to the *ad hoc* cases now standing for argument in the Court of Appeal. The fault is not the fault of the Court of Appeal. The regular list is being proceeded with as rapidly as consists with the importance of an appellate Court list; and the work of the Court of Appeal compares well in this respect with that of other appellate Courts.

It is the very fact that the Court of Appeal cannot hear the *ad hoc* cases without extraneous assistance that disables them from disposing of them. The Judges of the High Court are fully occupied with Circuit work, Divisional Court sittings, and single Court work, and it is therefore a matter of some difficulty to form a Court which can hear the cases in question. There is no doubt, however, that a strenuous effort should be made to have these cases disposed of, or louder murmurs of dissatisfaction will be heard.

With respect to the single Court sittings, they are not as satisfactory as they might be. Court work and chamber work are taken up on the same day, to the annoyance and dissatisfaction of many of the profession. We are strongly of the opinion that the Queen's Bench and Common Pleas Divisions should adopt the practice of the Chancery Division. Let them set apart one day (say Tuesday) for chambers, and one day (say Thursday) for Court work. At present a barrister who has chamber business alone, is frequently compelled to wait from eleven in the morning until late in the afternoon, while the Court work is being disposed of, with the chance of hearing at the end that all Chamber business is adjourned.

Filing Reports.

Under the new rule 599, the effect of which we erroneously stated at p. 66, all reports are to be filed at the place where the proceedings are carried on.

This rule introduces a most inconvenient practice. Almost all reports have to be dealt with at one time or another in the accountant's office, and the accountant generally requires production of the original report. In every case in which the accountant requires a report which is filed in the country there will result the delay and expense consequent upon sending for it to the office where it is filed, added to the danger of loss in transmission. The only alternative is to pass a rule requiring him to act upon an office copy of the report, which he will not do at present in all cases.

In addition to the inconvenience mentioned, there is the further inconvenience of having to produce some evidence to the accountant that the report has been filed in the proper office. Heretofore no such evidence was necessary, because the report was always sent to him upon request direct from the clerk of Records and Writs. Under the present rule, before he can act upon the report he must have some evidence of proper filing to justify him in acting upon it.

The practical working of a rule is the best test of its usefulness, and the short term of trial which this rule has undergone has sufficed to condemn it.

CORRESPONDENCE.

Unlicensed Practitioners.

To the Editor of THE CANADIAN LAW TIMES :

SIR,—The time is come for the legal profession to demand that which is due them by the Law Society. In the provincial towns it is notorious that two-thirds of the conveyancing and Surrogate Court practice is done by non-professional men, and a considerable amount of solicitor's work, in the shape of mortgage sales, etc., is likewise theirs. Their business is too frequently "drummed up" by personal canvass and flashy advertisements of "cheapness" and "neatness"; things which, if done by a solicitor, would involve the righteous wrath of an offended body. Many of these men, however, are of high standing in the community, enjoying the respect and confidence of their fellow-townsmen, and carrying the awful majesty of the law in their coat pockets, in the shape of a commission of the peace. They are amenable to no legal body, devote no time in study to their work, pass no examination, pay no fees, and are not responsible for mistakes. And yet they are permitted to secure the only remunerative portion of a country solicitor's practice, and this in a manner denied the profession by the Law Society.

The following is a summary of a solicitor's work to secure his profession: He is required,

1. To pass a matriculation, and pay an entrance fee to the Law Society of \$50.

2. To serve five years under an indenture to a qualified solicitor at a nominal salary, and to pass two intermediate examinations in law before the Law Society.

3. To pass an examination for certificate of fitness, and to pay to the Law Society \$60.

4. If a barrister, to pass the final examination and to pay to the Law Society \$100.

5. To pay to the Law Society \$17 per annum during practice.

In addition to these requirements there are numerous obligations imposed upon the practising solicitor, such as responsibility to clients for mistakes, and an extraordinary remedy for misconduct. No solicitor denies the wisdom of the Law Society in guarding well the honour and integrity of its members. The rules and regulations are as necessary to the protection of the profession as the public. But the Law Society would have fewer instances of professional misconduct, and the public would feel less severely the action of half-starving solicitors, if protection to the remunerative portion of a solicitor's work was granted by the Law Society. It is idle to hope that the Law Society will take the matter up and compel attention by the Ontario Government unless *data* are furnished them showing the enormous loss the profession sustains. I make the following suggestions for a proper presentation of the grievance:

1. Let the Law Society procure from each County—

(a) A Registrar's certificate of the number of deeds, mortgages and releases prepared by non-professional men throughout the County for the past year.

(b) A certificate from the County Court Clerk of the number of chattel mortgages and applications for probate and letters of administration prepared by non-professional men during the past year.

It is only just to the country practitioners that this should be done. They are a considerable and influential body of men in their districts, and wield a large power. They are called upon to assist in nearly everything to promote the good of their town and its people. Their pockets are ever called upon for charity, etc., and it is well that they should be singled out as men of honour and

largeness of mind, and not compelled by the circumstances above enumerated to be penurious and grubbing—the objects of a client's fear.

I am not so severe in my denunciation of non-professional men as to ask the Law Society to prohibit them from practice. I think it only fair and just that they should, on passing a proper examination or examinations, and on payment of fees, be allowed to practise conveyancing only; but they should be prevented from advertising “cheapness and neatness.” I invite discussion on the subject to awaken the Law Society to request that certificates be sent from the offices of the County Court and Registry to them. When this is done we may all look for protection.

Yours faithfully,

RURAL PRACTITIONER.

THE HAMILTON LAW ASSOCIATION.

(COMMUNICATED.)

This Association was formed in 1879, and held its Sixth Annual Meeting on 15th February, 1886. From the report submitted it appears that the association has steadily progressed until the library now contains upwards of 1800 volumes of the value of about \$8,000.00, and the members number seventy, all of whom paid the annual fees of 1885, six new members being added last year.

The report refers to the need of increased library accommodation, and to the steps taken to obtain the same from the County Council, and then proceeds:

“The increasing influence of the legal profession and, power of making their views known and felt through the means of Law Associations should be taken advantage of to give expression to any suggestions for the better administration of justice.

“ They would call attention to the large list of causes in the Court of Appeal in which one or more *ad hoc* judges are required, which have been standing over for a long time, and to the necessity for some provision being made for their being disposed of without more delay. As the judges of the Court of Appeal have ceased to go on Circuit, it is believed such a state of things is not likely to occur again ; but as the blame for delays generally falls on the profession, it is deemed but fair to place it in the proper quarter.

“ The block of business in the single judge Court and the frequent postponement of cases where counsel are in attendance from a distance to argue them, calls for redress.

“ Another matter to which they would advert is the postponement of cases and even the adjournment of Courts to suit the convenience of counsel. This has been noticed more than once in the CANADIAN LAW TIMES, and while it may on occasion be proper and even necessary to grant such postponements, the practice has become of too frequent occurrence.

“ The trustees recommend the continuance of the Committee on Legislation appointed by them on sixth November last.”

The officers of the association are: Æmilius Irving, Q.C., President ; Thomas Robertson, Q.C., Vice-President ; R. R. Waddell, Secretary ; A. Bruce, Q.C., Treasurer ; Trustees : Edward Martin, Q.C., F. Mackelcan, Q.C., G. M. Barton, J. W. Jones, and J. V. Teetzel.

BOOK REVIEWS.

Canadian Franchise and Election Laws. A manual for the use of revising officers, municipal officers, candidates, agents and electors. By C. O. ERMATINGER, one of Her Majesty's Counsel, and Member for East Elgin in the Legislature of Ontario. Toronto: Carswell & Co., 1886.

This book contains the Dominion and Provincial Franchise Acts with notes thereon in the first part. The second part comprises a short treatise on the laws respecting corrupt practices, agency, penalties, conduct of the election, ballot papers, persons who may not be elected, nor sit and vote.

Mr. Ermatinger in his introduction casts a doubt upon whether lodger franchise has been created by the Dominion Act, a doubt which is not quite clearly dispelled by his notes upon the interpretation clauses. A lodger as a lodger perhaps cannot vote, nor perhaps can he as an occupant; but as tenant of a portion of a house he probably can. "Real property," by the act means, amongst other things, a portion of a house; and "tenant" means a person who pays rent in money or produce to his landlord; and a lodger is tenant of a portion of a house.

The notes to the Act are full, and the appearance of the book is timely.

The Ditches and Watercourses Act of Ontario; with notes and references to decided cases. By MALCOLM GRÆME CAMERON, of Osgoode Hall, Barrister-at-Law, author of "A Treatise on the Law of Dower." Toronto: Carswell & Co. 1886.

This little book upon a subject of general importance to rural municipalities will be an excellent book of reference for municipal clerks and other officials who are called upon to exercise jurisdiction under the Act. The few decided cases are fully noted.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[26TH JANUARY, 1886.]

HATELY v. THE MERCHANTS' DESPATCH CO.

Security for costs—Delivery out of bond pending appeal to Court of Appeal.

The decision of the Queen's Bench Divisional Court, 11 P. R. 9; 5 C. L. T. 314, was reversed on appeal.

McCarthy, Q.C., and Wallace Nesbitt, for the appellants.

Aylesworth, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT.]

MILLER v. CONFEDERATION LIFE ASSURANCE CO.

Life insurance—Suppression by insured—Right to begin at trial—Discovery of new evidence—New trial—Direction to jury.

At the end of questions in an application made in December, 1883, for insurance, and forming part of the application, was an agreement signed

by insured stating that he warranted and guaranteed that the answers to the said questions were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any misstatements or suppression of facts made in the answers to said questions or in his answer to the medical examiner should render the policy null and void. The proposal and declaration were also made the basis of the contract.

Endorsed on the application were answers given to questions by a medical examiner, and at the end thereof a certificate signed by insured, stating that he had made full, true, and complete answers to the questions propounded by said examiner, and agreed to accept the policy on the terms mentioned in the application.

In answer to a question whether he had any serious illness, local disease, or personal injury, and if so, of what nature? insured answered, "No, except a broken leg in childhood."

There was an answer to a question giving one T.'s name as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so, for what and when, insured replied, "Dr. A., for a cold."

Insured had been thrown from a load of hay, and in his examination in a suit for damages against the municipality, he swore that he had been five weeks in bed suffering from his chest, and was at that time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors.

In reply to a question whether his grand parents, etc., brothers, etc., ever had pulmonary or other constitutional disease, he replied, "No;" and stated also, in reply to questions as to what disease his brother had died from, that he had died of over-growth.

It was shown that an elder brother had been treated by Dr. A., some years before, for pulmonary affection, and that insured had said that the brother who died had bled at the lungs and had been ill for some months before he died. Insured also, in answer to a question whether any material fact bearing on his physical condition or family history had been omitted, answered, "No."

Defendants admitted the policy, proofs of death, probate, etc., and accepted the burden of proof in the pleadings and at the trial, and claimed the right to begin, which was refused.

On motion in term, copies of letters and documents signed by insured sent to the government for leave to remain off a homestead in the North-West, and showing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884, were produced. It was shown that the existence of some such documents had been suspected, and that they had been searched for in all the government offices but could not be found, and that defendants received them the day after the trial.

Held, that the plaintiffs had the right to begin, notwithstanding such admissions. Wilson, C.J., reserved the consideration of the admission of the new evidence.

Per Armour, J. It could not be received, as it was merely corroborative, and its suspected existence would have been ground for asking to have the trial postponed.

Per Wilson, C.J. There should be a new trial. There was evidence to go to the jury as to the truth of the answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to injuries was a misrepresentation in facts: that the certificate meant the answers were given upon a knowledge of the facts and upon insured's belief in the truth of those facts; and a statement made without knowledge would not be protected by the formula, "best of my knowledge and belief," if insured had no knowledge; nor would such statements be protected if made regardless of insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to *the best* of his knowledge.

Per Armour, J. The direction to the jury whether insured had stated to the best of his knowledge and belief the truth in regard to deceased's brother was sufficient.

As to the accident, it was one which ought to have been mentioned, but it was probably considered of too little importance by the insured, or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the facts, but answered to the best of his knowledge and belief, and the proposals were not warranties.

The Court being equally divided, the motion for a new trial was dismissed with costs.

S. H. Blake, Q.C., and A. Cassels, for the motion.

McMichael, Q.C., and McCarthy, Q.C., contra.

JENNINGS v. HYMAN.

Assignment for creditors—Release of debtor—Dissenting creditors—Preference.

An insolvent debtor informed his creditors of his difficulties, and, on the 19th March, 1885, all but two of the creditors signed a memorandum stating that the best thing he could do was to sell out his stock and effects for a sum named, and which would pay all his creditors fifty cents on the dollar, on certain terms; and those who signed agreed to accept fifty cents in full of their claims.

Accordingly the debtor, by bill of sale dated 9th April following, sold and conveyed his assets to one of the creditors who had executed the previous deed for the sum and on the terms named therein, which were that the debt was to be payable in four and eight months, and the purchaser was to endorse the vendor's notes, so that he could transfer them to the creditors.

The Bill of Sale referred to the previous agreement, and recited that "the creditors" had agreed to accept these notes "in full satisfaction and discharge of their respective claims" against the debtor; and also provided that the balance, if any, "after deducting the debt of the vendees" (who were among those agreeing to accept the fifty cents composition), should be paid to the debtor.

Held, that this amounted, in effect, to a condition that any creditor receiving the fifty cents on the dollar of his claim should release the debtor, and that the sale was therefore void against the two non-assenting creditors, under R. S. O. cap. 18, sec. 2.

Per O'Connor, J. (i) The non-assenting creditor might guard himself against the effect of the above recitals by a special receipt, but he should not be driven to that artifice, even if the purchasers could properly accept such a receipt, which was questionable; and (ii) the reservation to the purchasers of "the amount of their debt" was ambiguous, and might mean their whole debt, in which case the sale was preferential and so void.

ARSCOTT v. LILLEY.

Keeping a bawdy house—Habeas Corpus—Penalty under 31 Car. II. cap. 21, sec 6.

Defendant L., a J.P., convicted the plaintiff for keeping a bawdy house, sentencing her to six months' imprisonment, after undergoing two days of which she was released on bail pending an appeal to the Sessions. The appeal was dismissed, and the plaintiff was again arrested on L.'s warrant, under advice of the defendant H., the County Crown attorney. She was discharged on habeas corpus under the latter warrant, because it did not take into account the two days' imprisonment. She was again arrested under warrant issued by the same Justice upon the original conviction.

In an action brought by the plaintiff for the penalty of £500 awarded by sec. 6 of 31 Car. II. cap. 2,

Held, reversing the judgment of Cameron, C.J., at the trial, that this section of the Act does not apply where the prisoner is confined upon a warrant in execution.

Held, also, that a warrant in execution issued by the convicting Justice on discharge of the prisoner from custody for defects in the former warrant was the legal order and process of the Court having jurisdiction in the cause.

Semble, the warrant issued after the dismissal of the appeal by the Sessions, and the original conviction in directing imprisonment for six months without allowing for the two days' imprisonment was not open to objection.

SMITH v. CITY OF LONDON INS. CO.

Insurance—Misdescription of premises—Waiver—Arbitration—Verdict—Variance—Statutory conditions—Variation.

The plaintiff described insured building by a term intended for *board* but read by the Company as *brick*, as which they insured the premises, not finding out the mistake till after the fire. The 17th statutory condition in the policy was that the loss should not be payable for 30 days after completion of proofs of loss, unless otherwise provided by statute or the agreement of the parties, and there was a condition in the policy, as required by the Fire Insurance Policy Act, as a variation of the condition, that the loss should not be payable till 60 days after the completion of claims. The action was begun more than 30 but less than 60 days after the fire. After action the defendants demanded a magistrate's certificate under statutory condition 13 E., and had an arbitration under condition 16, and by the award the value of the building was put at \$2,500, and the loss at \$1,700. The jury found the former \$3,500, and the loss \$3,500.

Held, per Wilson, C.J. (i.) That by reason of the mistake as to the character of premises, there never was any contract, but that the defendants waived the right to object to the mistake by demanding the magistrate's certificate and the arbitration. (ii.) That the finding of the jury as to value of the building must prevail, notwithstanding the award. (iii.) That the conditions that the loss should not be payable till 60 days after the completion of the claim, being in the policy and not dissented from by the plaintiff, constituted an agreement between the parties, and that it was a reasonable condition, but that it was unreasonable for the Company to insist upon, as they never intended to pay the loss.

Per Armour, J. Following *Parsons v. Queen Ins. Co.*, 2 Ont. R. 45, any variation of the statutory condition is *prima facie* unjust and unreasonable.

Robinson, Q.C., and *Miller*, for the plaintiff.

McCarthy, Q.C., and *W. Nesbitt*, for the defendants.

In re KNIGHT v. UNITED TOWNSHIPS OF MEDORA & WOOD.

Prohibition—43 Vict. cap. 8, sec. 14—48 Vict. cap. 14, sec. 1—Colonization road—Title to land.

Held, that a prohibition would not lie to the Fourth Division Court of the district of Muskoka, no notice having been given, as required by 48 Vict. cap. 14, sec. 1, amending sec. 14 of 43 Vict. cap. 8, disputing the jurisdiction of said Court; and that in any case prohibition would not lie where, as here, the title to the road upon which the injury complained of arose was not in fact in question, the road being a colonization road, built by the Government before the organization of the Townships of Medora and Wood as a municipality, and the question arising not being one of title, but of liability to keep in repair a road so built.

Arnoldi, for the motion.

Pepler, contra.

GOLDSMITH v. CITY OF LONDON.

Municipal corporation—Defective sidewalk—Negligence—Misdirection.

The plaintiff, while crossing a certain street in the City of London, stumbled against the end of a sidewalk which was constructed of asphalt boxed in with boards, and was some four inches higher than the crossing, fell and received severe injuries.

Held, Wilson, C.J., dissenting, evidence of negligence that must have been submitted to the jury, and that, having found in favour of the plaintiff, their verdict could not properly be interfered with.

Held, also, that it was no misdirection to tell the jury that they were at liberty to infer that there was no evidence of negligence; that if the roadway was at that level when the accident occurred, it had been filled up between then and the examination of it by the defendant's witnesses.

R. M. Meredith, for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

LAXTON v. ROSENBERG.

Ejectment—Receipt of rent after action brought—Waiver—Intention.

In an action of ejectment, the plaintiff alleged a demise to the defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, the plaintiff received from the defendant a payment of rent.

Held, affirming the judgment of Rose, J., at the trial, that there is no distinction in principle between the effect of the payment of rent as such after action brought upon the determination of the tenancy by notice to quit, and by forfeiture, and therefore the payment of rent in this case after action brought had no effect whatever upon the action, either as a bar to suit or as a waiver of the notice to quit.

Held, also, that the intention with which the rent was received must be taken into consideration. *Doe dem. Theney v. Batten*, Cowp. 243, approved; *Cheney v. Lumbay*, 6 H. L. C., commented on.

S. M. Jarvis, for the motion.

Watson, contra.

DEVERILL v. COE.

Tax sale—Action by purchaser for possession.

The lands in question were, in 1879, assessed as non-resident. The defendant came to reside on them during that year, and paid taxes to the regular collector, whereas, under the Assessment Act, the Treasurer is the proper party to receive.

No notice was given of arrears to the then owner, and the lands were not put on the roll for 1882, as required by the Act.

The owner paid all taxes subsequently demanded of him, including those for 1882, but the lands were nevertheless put up and sold for a trifling sum.

Quære, per Wilson, C.J., whether there was not, in this case, evidence that the lands were not sold in "a fair, open and candid manner."

Held, tax sale void, as taxes under the circumstances were not in arrear.

Held, per Armour, J., the substantial performance of the provisions of R. S. O. cap. 180, secs. 108, 109, 110 and 111, is a condition precedent to the right of sale; and as there was no performance of these, the attempted sale was bad.

Remarks of Wilson, C.J., on the impropriety of tax sales as now conducted under legislative authority.

McCarthy, Q.C., and *J. E. Robertson*, for the motion.

H. W. M. Murray, and *Delamere*, contra.

MOORE v. MITCHELL.

Libel—Pleading in mitigation of damages.

In libel, a plea in mitigation of damages must in its nature admit the plaintiff's right to some compensation, but it amounts to a contention that the recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded. Such plea, based upon the plaintiff's bad character, must either show the plaintiff a person of bad general reputation or character, or a bad character with regard to some specific act relating to the charge in the libel complained of.

It is not open to a defendant to plead justification to libel, and under such defence to offer evidence of the plaintiff's bad character in mitigation of damages.

Marsh, for the motion.

Millar, contra.

HOLDERNESS v. LANG.

Short form lease—Covenant to repair—Alterations by tenant—Waste—Waiver—Forfeiture.

The plaintiff leased, under R. S. O. cap. 103, to the defendant, premises for a grocery and liquor store for five years. The defendant subsequently broke a door through an inside brick wall. The plaintiff at first objected, but afterwards in effect assented. A partition, part glass and part wood, in which was a door separated the office from the store.

Subsequently the defendant began to move this partition nearer the centre of the store, substituted wood for glass, closed the door, and converted a front window into a door, so as to make the office into a liquor store, in order to comply with the law requiring separation of liquors from groceries. The plaintiff claimed an injunction to prevent further waste, and the right to re-enter for breach of covenant to repair. The judge at the trial finding no damages,

Held, (i) that making the door in the wall, if a breach of the covenant to repair, was not a continuing one, and was waived. (ii) That, under the statutory covenant to repair, the tenant being bound to keep in repair both premises and all fixtures and erections made during the term, he had the right to erect or to make such fixtures, etc. (iii) The plaintiff's reversion not being injured, there was no waste or forfeiture.

MacLennan, Q.C., for the plaintiff.

J. J. Maclaren, for the defendant.

McQUAID v. COOPER.

*Provisional Judicial District of Thunder Bay—47 Vict. cap. 14, secs. 4, 5—
Title to land—Jurisdiction.*

Held, that the jurisdiction conferred on the District Court of the Provisional Judicial District of Thunder Bay, by 47 Vict. cap. 14, secs. 4, 5, is not subject to the exceptions to the general jurisdiction of County Courts mentioned in R. S. O. cap. 43, sec. 18; and that, therefore, that District Court has power to try actions in which the title to land comes in question.

Watson, for the motion.

Aylesworth, contra.

REGINA v. RAMSEY.

[GALT, J.]

*Canada Temperance Act, 1878, secs. 106, 111—Jurisdiction—Certiorari—
Appeal to Quarter Sessions—Conviction quashed.*

Where a defendant submits to examination before a magistrate, it is too late afterwards to object to its propriety.

In cases where a magistrate has jurisdiction, certiorari is absolutely taken away; but an appeal to the Quarter Sessions still exists, which, however, is also by sec. 111 of the Canada Temperance Act of 1878 taken away where the conviction is before a stipendiary magistrate.

It is imperative, under sec. 105 of the above Act, that an information thereunder be laid before two Justices, and that they both be named in

the summons to the defendant. Where, therefore, a summons stated that an information had been laid only before the Justice who signed it, and yet called upon the defendant to appear before another named Justice as well as himself,

Held, that the Justices had no jurisdiction, and that the defendant's appearing before them did not confer it; a conviction was, therefore, quashed.

Bell, for the motion.

Haverson, contra.

[O'CONNOR, J.]

REGINA v. ELI.

Canada Temperance Act—Conviction—Summons served just before return thereof—Interest of magistrates.

The defendant was steward of a "social club" in Walkerton. The members were elected by ballot and, on paying an entrance fee of \$1 and subscription of \$25 per month, were entitled to use the club room and to buy from the steward spirituous liquors. The members were not responsible for goods ordered or for any general expenses. An information was laid against the defendant on 10th September, 1885, for an offence against the second part of the Canada Temperance Act, 1878, and on 21st September, 1885, he was, about 3 p.m., served with a summons to appear at 8.30 a.m., next day, before two magistrates. On the 22nd day of September informations were, in two other cases, laid against him for similar offences, and he was in each, at 8.15 a.m., served with a summons to appear before the magistrates at 9 a.m. that day. When the magistrates' Court met, the first case was partially gone into, and before it was closed the prosecution asked the magistrates to take up the second and third cases. The defendant stated that he had not understood what the summonses meant and by advice of counsel refused to plead. The magistrates entered a plea in each case of not guilty, and went on with both cases. The evidence in both showed that the offences charged in each case occurred on dates different from those laid in the informations. The magistrates amended the dates in the informations. The defendant and his counsel were in Court all the time awaiting completion of the evidence in the first, but refused in any way to plead or take part in the second and third cases, or to ask adjournment thereof. The magistrates, after taking all the evidence therein, at request of the defendant adjourned the first case, and in the second and third cases convicted the defendant of the offences as charged in the amended informations. It was shown by affidavits that the magistrates were willing in these cases, had defendant pleaded, to adjourn after taking the evidence of the witnesses present. There were affidavits showing that the magistrates had been, before the Scott Act, interested in promoting temperance.

The convictions were quashed, with costs against complainant, on the ground that the proceedings were contrary to natural justice, as the

summonses were served almost immediately before the sittings of the Court which defendant was called to attend.

Regina v. Klemp, 10 Ont. R. 143, was followed as to the charge of interest.

H. J. Scott, Q.C., for the motion.

Allan Cassels, contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 6TH MARCH, 1886.]

INGALLS v. McLAURIN.

Mortgagor and mortgagee — Collusive purchase — Deed covering mortgaged property—Concealment.

The judgment of Cameron, C.J.C.P., reported ante p. 122, affirmed.

Per Boyd, C. If the defendant did know as a matter of fact the legal effect of G.'s action in buying the property he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance of which the obvious intent was only to procure his wife's dower to be barred; if he did not know the effect of it the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff.

W. Nesbitt, for the appeal.

J. R. Roaf, contra.

COTTINGHAM v. COTTINGHAM.

Funds in Court—Assignment—Notice to accountant—Stop order—Notice to the Court.

H. M. C., being entitled to certain moneys in Court, obtained certain advances from A. H., and gave him a power of attorney to endorse any cheques issued to him by the Court and repay himself. Subsequently, H. M. C. obtained an advance from W. H., and assigned all his interest in the funds in Court to the latter, which assignment was duly filed in the accountant's office and entered in the accountant's books and acted on for three years. W. H. had no notice of A. H.'s power of attorney. A. H. recovered a judgment against H. M. C. for the amount due him in December, 1883, and obtained a stop order in October, 1885.

On a notice of motion for payment out to A. H., which was resisted by W. H., who claimed all the moneys under his assignment, it was

Held, that the Court is the custodian of the fund, and not the accountant, and that notice to the accountant of an assignment of funds in Court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such a security.

Per Boyd, C. It was not necessary for A. H. to recover a judgment in order to entitle him to a stop order. Payments out under the assignment should not be interfered with, as the lodging of the assignment with the accountant was sufficient under the practice to justify payments out in the absence of any claim by A. H. under the first assignment.

Per Ferguson, J. A. H., having the earlier assignment, was first in point of time, and *prima facie* would be preferred in law, and had obtained a stop order, which has been held to be the proper way of giving notice to the Court, and thereby perfected his assignment.

G. H. Watson, for the appeal.

J. T. Small, contra.

[BOYD, C., 20TH JANUARY, 1886.]

MURPHY v. THE KINGSTON AND PEMBROKE R. W. CO.

Consolidated Railway Act of 1879, 42 Vict. cap. 9 (D.)—Expropriation of land—Plans and book of reference—Limits of deviation.

The defendants having in 1872 filed their plan and book of reference under the Railway Act, showing their terminus at a certain point, and having built and used their line up to that point, desired in 1885 to extend their line about one-third of a mile, and took proceedings to expropriate certain land required for that purpose, and possession having been refused, applied to a County Judge for an order for immediate possession. In an action for an injunction to restrain the Company from proceeding before the County Judge, on the ground that no new plan and book of reference showing the land required had been filed, and in which the Company contended that none were necessary as they were within the limits of deviation of one mile provided for by the statute, it was

Held, that "deviation" is a term not to be restricted to a lateral variance on either side of the line, but may mean a change *de via* in any direction within the prescribed limits, whether at right angles to or deflecting from, or extending beyond the line.

Britton, Q.C., for the plaintiff.

Cattanach, for the defendants.

[17TH FEBRUARY, 1886.]

*In re PERCY ; STEWART v. PERCY.**Administration—Arrears of dower—Dower in equity of redemption—Instalment mortgage.*

This was an appeal from the Master at Walkerton, and arose out of the administration of the estate of Thomas Percy, who died on 2nd February, 1882. The usual administration order was made, with a reference to the Master at Walkerton, on 14th February, 1884. It appeared in the Master's Office that the only real estate which the deceased died entitled to was a certain hotel property. The Master, in the course of the administration proceedings, sold this on 13th November, 1884. It appeared that this hotel had been purchased by the deceased subject to a then existing mortgage upon it. The Master, therefore, allowed the widow, Margaret Percy, dower in the surplus only of the purchase money left after discharging the amount of the mortgage. A claim was made, however, by Margaret Percy for a further sum as arrears of dower. It appeared that she had been in possession of the property from her husband's death by herself, or her tenants, up to the administration proceedings, and she had received certain rents. The Master fixed the arrears of dower, by taking the amount of rents received *plus* an occupation rent, fixed by him for a time when the widow was herself in possession, deducted from the amount thus arrived at a certain sum paid for taxes by the widow during that period, and certain other sums paid during that period by the mortgagees for insurance, and he also charged her with a certain sum as interest on the mortgage debt, charging same at ten per cent., and he gave the widow as arrears of dower one-third of the balance. It appeared, however, that the mortgage was an instalment mortgage, being payable in instalments composed of principal and interest together. The present appellants contended that the widow should have been charged with one-third of all the instalments which fell due during the period referred to, and also with one-third of the taxes and the insurance money paid upon the property.

Held, that the appeal arising in respect of arrears of dower, the husband not having died seized in fee so as to give the widow legal dower, she was not entitled to arrears as of right, but only on the equitable consideration of the Court, which would be exercised in her favour by not requiring her to account for all rents received; and the arrears of dower should be fixed by deducting from the rents received and the occupation rent fixed by the Master the amounts properly and actually expended by the widow on taxes, insurance, repairs and payment on the mortgage, and then allowing her one-third of the balance for the arrears of dower.

A. H. F. Lefroy, for the appellant.

Hoyles, for the respondent.

[10TH MARCH, 1886.]

SMITH v. McLELLAN.

Marriage settlement—Power of appointment—Execution of, or delegation of power—Vendor and purchaser—Power of revocation.

In a marriage settlement it was provided that in case there were no children and W. K. S., the husband, survived his wife, M. M. S., the lands settled were to be held in trust "for such person * * as he the said W. K. S. by any deed or deeds with power of revocation and new appointment to be by him signed * * or by his last will and testament in writing, or any codicil thereto * * shall direct and appoint * * " W. K. S. predeceased his wife, leaving no children, after making his will, in which he devised to his wife all his real and personal estate, and provided as follows:—

"I do also transfer unto her all the powers vested in me to bequeath, convey, execute by will or otherwise, all or any of certain properties conveyed to her by deed of settlement * * " M. M. S. subsequently appointed the lands to her own use, and made a sale of part of them. On the statement of a special case for the opinion of the Court, it was

Held, that the will of W. K. S. was not an execution of the power, but a valid delegation of it to his wife; that an appointment could only be properly made in her favour by a deed with power of revocation, or in favour of another by will; and that a purchaser from her under an execution of the power by deed would not be compelled to accept the title under the power because of its revocable character.

McMahon, Q.C., and Moss, Q.C., for the plaintiffs.

E. Martin, Q.C., and Kittson, for the defendants.

[17TH MARCH, 1886.]

In re KINGSTON AND PEMBROKE RAILWAY CO. & MORPHY.

Railways—Expropriation of lands—Order for immediate possession.

Immediate possession of land alleged to be necessary for the purposes of a railway should not be granted to the railway on summary process under the Railway Act, unless two points are very clearly established: (i) that the company has an indisputable right to acquire the land by compulsory proceedings; and (ii) that there is some urgent and substantial need for immediate action; and inasmuch as these points could not be said to have been clearly established in the present case the Court decided not to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands.

A. J. Cattnach, for the applicants.

S. H. Blake, Q.C., contra.

LATTA v. LOWRY.

Will, construction of—Vesting liable to be divested to let in new members of a class.

Held, that the following rule, laid down in Hawkins on Wills, at page 72, appears to be substantiated by the authorities:—"If real or personal estate be given to A. for life, and after his decease to the children of B., all the children in existence at the testator's death take vested interests, subject to be partially divested in favour of children subsequently coming into existence during the life of A." The death of any child before the period of distribution does not affect the right of that child's representatives to claim the share of the deceased.

Paradis v. Campbell, 6 Ont. R. 632, distinguished.

Moss, Q.C., *W. Cassels*, Q.C., and *J. Hoskin*, Q.C., for the various parties.

[PROUDFOOT, J., 28TH JANUARY, 1886.]

PLATT v. GRAND TRUNK RAILWAY CO.

Covenants for title—Breach of—Continuing damage—Death of covenantee—Survival of right of action.

This action was brought by S. P., to whom the defendants had conveyed certain lands for a mill site and certain easements and privileges having reference to the mill site, with the usual covenants for title. S. P. now complained that the defendants had no right to convey to him, and that his quiet enjoyment of the premises had been interfered with by persons having a better title, and he claimed for all damages sustained and to be sustained by reason of the breach of the covenants for title. After the case was set down for hearing, S. P. died intestate, and his administratrix obtained an order of revivor which was now sought to be set aside on the ground that the right of action, if any, was not one that survived to the representatives of S. P., or if it did survive, that it survived to the real representatives or to the real and personal representatives jointly.

Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same, but that the action had nothing to do with damages which might have accrued since that time, for which, *semble*, the heir or devisee might bring an action; and the motion was therefore dismissed.

In the case of such covenants running with the land where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach has taken place, but damages have accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representatives.

S. H. Blake, Q.C., for the motion.

J. MacLennan, Q.C., contra.

. IN CHAMBERS.

[BOYD, C., 10TH MARCH, 1886.]

QUAY v. QUAY.

Taxation—Appeal—Local Registrar—Enlarging time—Jurisdiction of Master in Chambers—Certificate—Confirmation—Taxing officer—Revision.

Appeals from the taxation of costs by local registrars are subject to the eight days' limit prescribed as to appeals from orders of Masters and local Judges, as was held in *Stark v. Fisher*, ante, p. 88, but the time for appealing may be enlarged by the Master in Chambers or a Judge.

The certificate of a local registrar as to the result of the taxation by him of the costs of an action is not to be treated like the report of a Master, which is appealable until confirmed by the lapse of a month from the making and two weeks from the filing of the same.

It is a convenient practice when any case is made on appeal from taxation as to several items or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto as upon a revision.

W. H. P. Clement, for the plaintiff.

Holman, for the defendant.

[17TH MARCH, 1886.]

BALL v. CROMPTON CORSET COMPANY.

Costs—Taxation—Tariff—Foreign witness—Rules of T. T. 1856, 154 & 168.

The tariff of costs now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. The object of a tariff is to provide a fixed or moveable scale for usual and ordinary services, and as to all items embraced therein it is generally conclusive; but for other matters one has to go outside of the tariff to the practice and course of the Court. It is, therefore, for the taxing officer to determine, according to a proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction.

Rules 154 and 168 of T. T. 1856 are still in force.

Akers, for the plaintiffs.

Langton, for the defendants.

[PROUDFOOT, J.]

MACDONELL v. McDONALD.

Foreclosure—Computation of interest—More than six years' arrears—Action on covenant—Amendment.

On an appeal from the report of a Master who had allowed more than six years' arrears of interest in taking a mortgage account.

Held, that in a foreclosure action interest when due for more than six years will be allowed in taking the mortgage account, instead of allowing it for six years only and compelling the plaintiff to bring another action on the covenant to recover the balance.

Floweren v. Bradbury, 22 Gr. 96, commented on.

Allan v. McTavish, 2 App. R. 278, followed.

Wilson, for the appeal.

Holman, contra.

[O'CONNOR, J., 2ND MARCH, 1886.]

In re GORDON v. O'BRIEN.

Prohibition—Division Court—Splitting amount to give jurisdiction—R. S. O. cap. 47, sec. 59—Ascertainment of amount.

The defendant rented certain premises from the plaintiff for a year agreeing in writing to pay monthly \$125 a month therefor. When the rent had become four months in arrear the plaintiff entered three plaints in a Division Court against the defendant, each for a month's rent.

Held, that the sums claimed in the three plaints were payable under the one contract and would have been included in one count in the old system of pleading, and therefore that the division into three was improper under R. S. O. cap. 47, sec. 59.

Held, also, that the defendant's signature to the memorandum of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered.

Idington, Q.C., for the plaintiff.

Woods, Q.C., for the defendant.

[THE MASTER IN CHAMBERS, 26TH FEBRUARY, 1886.]

TATE v. THE GLOBE PRINTING COMPANY.

Examination of party—Pleading—Libel—Rule 285.

In an action of libel charging the publication in a newspaper of a report of, and editorial comments upon, the trial of the plaintiff for the abduction of a girl, an order was made under Rule 285 for the examina-

tion of the plaintiff before delivery of defence, in order to enable the defendants to frame their defence. The examination was limited to the damages claimed by the plaintiff, and his conduct with and toward the girl.

A. J. Murray, for the plaintiff.

Osler, Q.C., for the defendants.

GONEE v. LEITCH.

Changing venue—Cross actions—Consolidation—Balance of convenience.

The plaintiff having laid the venue in Toronto, the defendant brought a cross action, laying the venue at London. The two actions were consolidated in Chambers.

Held, that both parties being in the position of plaintiffs, the rule as to the plaintiff's right to lay the venue where he chose could not be applied, and the only question was whether London or Toronto was the more convenient place for both parties; and the balance of convenience being in favour of London, the place of trial was changed accordingly.

Kappelle, for the plaintiff.

W. H. P. Clement, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

Ex parte BOYCE.

Summary Convictions Act—Warrant to arrest—Information—Belief of complainant—Substantiation of.

A sworn information stating that the complainant has just cause to suspect and believe and does suspect and believe that the party charged has committed a specified offence triable under the Summary Convictions Act (32 and 33 Vict. cap. 31) will not authorize a Justice to issue his warrant to arrest in the first instance. It is the duty of the Justice before issuing a warrant to examine upon oath the complainant, or his witnesses, as to the facts upon which such suspicion and belief are founded, and to exercise his own judgment thereon.

TAYLOR v. THE DOMINION TELEGRAPH CO.
RAYMOND v. THE SAME.

Telegraph company—Trespass for cutting trees—Justification under Act of incorporation—Title to land—Costs.

In trespass for cutting trees, the defendants (a Telegraph Co.) justified the cutting under an Act of Parliament authorizing them to enter on land and cut trees, if it was necessary to do so for the purpose of constructing their line; and this was the only issue in the case. A verdict having been found for the plaintiff for less than \$200 damages, the Court was equally divided in opinion whether, on this issue, the title to land was in question, and whether the plaintiff was entitled to Supreme Court costs under the Act 45 Vict. cap. 9, sec. 7.

THE CANADA LIFE ASSURANCE CO. v. CALKINS.

Surety—Bond for faithful performance of agent's duties—Discharge of surety by alteration of agent's duties—Continuing agency—Pleading.

The declaration was on a bond, and after reciting that D. had been appointed plaintiffs' agent, and that defendant had become security for the faithful performance of D.'s duties, stated the condition of the bond to be that D. should from time to time, and at all times thereafter faithfully execute the office of agent, and pay over all moneys, etc. Breach, that he had not accounted, etc.

Pleas.—1. That by agreement between plaintiff and D. before making the bond D.'s appointment was to be for a year, and that he had faithfully discharged all his duties as agent while he was so employed.

2. That after the execution of the bond, and before breach, the agreement mentioned in the first plea was cancelled, and a new agreement made with D. imposing different and more onerous duties on him, without the defendant's consent.

Held, 1st. That the second plea was good, as it showed a material alteration in the original contract, whereby D.'s duties were different from those for the performance of which the defendant became liable, and that he was thereby discharged. 2nd. (Allen, C.J., dissenting) that the first plea was good; that the words of the bond, that D. should from time to time, etc., faithfully execute the office of agent, had no fixed meaning as to the continuance of the agency, and were not inconsistent with his appointment for a limited time—which defendant had a right to prove.

Per Allen, C.J. The bond showed a continuing agency till terminated by the parties; and the verbal agreement that it was to be for a year was at variance with the construction of the bond.

MUIRHEAD v. LOBAN.

Confession of Judgment—Future advances—Dispute as to intention of securing such advances—Right of creditor to be repaid amount advanced.

A. being indebted to B. in the sum of \$395, gave him a confession of judgment for \$1,000; B. afterwards made further advances, amounting in the whole to \$996, and signed judgment for \$1,000, and issued execution for that sum. A. then applied to set aside the judgment and execution, alleging in his affidavit that the confession was only intended as a security for his then existing indebtedness to B. This was denied by B.

Held, per Palmer, King and Fraser, JJ., that the judgment should stand for the amount advanced.

Per Wetmore, J. As the affidavits were conflicting, an issue should be directed to try whether the confession was given to secure the future advances.

HICKSON v. LOBAN.

Confession of judgment — Motion to set aside on ground of fraud—Application by judgment creditor—Contradictory affidavits—Determination of by Court.

Defendant being indebted to plaintiff, and also to M., gave plaintiff a confession of judgment for a sum equal to both debts, on which judgment was signed. An application by B., a judgment creditor of defendant, to set aside the judgment on the ground that M.'s debt had been fraudulently included in the confession, was refused because the applicant had not established the fraud.

Held, per Palmer, King and Fraser, JJ., Wetmore, J., dissenting, that the Court was bound to determine the question of fraud.

Quære, whether a judgment creditor of defendant could object that M.'s debt was improperly included in the confession—the amount being due to M.

Doe dem. MAYOR, &c., OF ST. JOHN v. BAIRD.

Ejectment for non-payment of rent—Affidavit of tenant's holding—Death of lessee.

Where a lessee under a lease containing a clause for re-entry for non-payment of rent died intestate, leaving his widow in possession, though letters of administration had not been granted, service of declaration upon her is sufficient to entitle the landlord to a rule for judgment in ejectment for non-payment of the rent.

Ex parte McBEAN.

Landlord and Tenant—Con. Stat. N. B. cap. 83—Mortgagor and Mortgagee—Summary Ejectment.

There is not such a tenancy existing between a mortgagor and mortgagee as will render the former liable to proceedings by summary ejectment under the Con. Stat. cap. 83, sec. 22, and the Act 43 Vict. cap. 12.

YOUNGCLAUS v. WALLACE.

City Court of Saint John—Bailable Action—Execution delivered to Sheriff to fix bail—Effect of.

By Consol. Statutes cap. 53, sec. 11, relating to the City Court of Saint John, bail are made liable for payment of the amount which the plaintiff recovers, or that the defendant shall be rendered into custody on execution, if the execution is delivered to the sheriff for the purpose of being executed within forty days after judgment.

Held, per Weldon, Wetmore and King, JJ., Palmer and Fraser, JJ., dissenting, that where in an action in such Court, the execution was delivered to the sheriff to "fix bail," it was not delivered *to be executed*, and the bail were not liable.

PRINCE EDWARD ISLAND.

In the Supreme Court.

[JANUARY, 1886.]

REGINA v. GILLIS.

Murder—Grand juror may be called to prove that evidence given by a witness on the trial differs from that given by same witness before the grand jury.

On the trial of Alexander Gillis for murder, his counsel called the foreman of the grand jury which found the bill against him, to prove that a witness' evidence before the grand jury was different from that given by the witness on the trial. Counsel for the crown objected that a grand juror could not be allowed to give evidence of what took place in the grand jury room.

Held, that a grand juror's obligation to keep secret what transpired before the grand jury only applied to what took place among the grand jurors themselves, and did not prevent his being called to prove what a witness had said.

Hodgson, Q.C., fo. the Crown.

Peters, for the prisoner.

In re BEAGEN.

Information—Conviction—Variance—40 Vict. cap. 30, secs. 1 and 3.

Anne Beagen lodged a complaint before a Justice of the Peace against her husband, Patrick Beagen, under 40 Vict. cap. 30, sec. 1, which enacts that whoever has upon his person a pistol without reasonable cause * * * * * may upon complaint before any Justice of the Peace be required to find securities for keeping the peace for any term not exceeding six months, or be imprisoned for not more than thirty days. In her information she alleged that he carried a revolver, and that she was in bodily fear, and she prayed that he might be required to find securities to keep the peace and that the Justice of the Peace might proceed summarily on her information and complaint. On this information a warrant was issued and he was arrested, tried before two Justices, convicted, and sentenced to three months' imprisonment under section 3 of the statute, for having a pistol upon his person. The Supreme Court granted a rule *nisi* for his discharge on the grounds (1) that the conviction was illegal, the prisoner having been arrested under a warrant founded on a complaint for one offence, and tried and convicted for another and different offence ; (2) that the Justices had power only, under the information laid, to bind Beagen over to keep the peace, or in default of securities to imprison him for thirty days.

Held, that the information was sufficient to support a conviction under either section of the statute.

H. V. Palmer, for the Justices.

A. Peters, for the prisoner.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

QUEBEC.]

TREMBLAY v. SCHOOL COMMISSIONERS OF ST. VALENTIN.

*Con. Stat. L. C. cap. 15—40 Vict. cap. 22, sec. 11 (Q).—Construction of—
33 Vict. cap. 25, sec. 7 (Q)—Erection of a school-house—Decision of superintendent—Final mandamus.*

Under 40 Vict. cap. 22, sec. 11, the Superintendent of Education for the Province of Quebec, on an appeal to him from the decision of the School commissioners of St. Valentin, ordered that the school district of the municipality of St. Valentin should be divided into two districts with a school house in each. The school commissioners by resolution subsequently decreed the division, and a few days later on a petition presented by ratepayers protesting against the division they passed another resolution refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the superintendent, they passed a resolution declaring that the district should not be divided as ordered by the superintendent but should be reunited into one. In answer to a peremptory writ of mandamus granted by the Superior Court, ordering the school commissioners to put into execution the decision of the Superintendent of Education, the school commissioners (respondents) contended that they had acted on the decision by approving of it, and that, as the law stood, they had the power and authority to

reunite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the superintendent.

Held, reversing the judgment of the Court of Queen's Bench (appeal side), that the commissioners had acted under the authority conferred upon them by Con. Stat. L. C. cap. 15, secs. 31 and 33, and an appeal having been made to the Superintendent of Education, his decision in the matter was final [40 Vict. cap. 22, sec. 11 (Q)], and could only be modified by the superintendent himself on an application made to him under 33 Vict. cap. 25, sec. 7; and therefore that a peremptory mandamus ordering the respondents to execute the superintendent's decision should issue.

Trudel, Q.C., and *Geoffrion, Q.C.*, for the appellants.

Beaudin, for the respondents.

SCHOOL COMMISSIONERS FOR ST. GABRIEL v. THE SISTERS OF THE CONGREGATION.

School taxes—32 Vict. cap. 16, sec. 13 (Q)—Con. Stat. L.C. cap. 15, sec. 77—41 Vict. cap. 6, sec. 26 (Q)—Construction of.

In an action brought by the appellants against the respondents to recover the sum of \$303.50 for three years school taxes, imposed on property occupied by them as a farm situated in one municipality, the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the Mother House, situated in another municipality,

Held, reversing the judgment of the Court below, that as the property taxed was not occupied by the respondents for the objects for which they were instituted, they were liable for the school rates imposed.

Held, also, that Con. Stat. L. C. cap. 15, sec. 77, s-s. 2 is not repealed by 32 Vict. cap. 16, sec. 13 (Q); see 41 Vict. cap. 6, sec. 26.

Geoffrion, Q.C., for the appellants.

Lacoste, Q.C., for the respondents.

WYLIE v. THE CITY OF MONTREAL.

Con. Stat. L. C. cap. 15, and 41 Vict. cap. 6, sec. 26 (Q)—Art. 712, Mun. Code, P. Q.—Construction of.

Held, Gwynne, J., dissenting, that property situated in the City of Montreal and occupied by its owner exclusively as a boarding and day

school for young ladies, and receiving no grant from the municipal corporation, is an "educational establishment" within the meaning of 41 Vict. cap. 6, sec. 26 (Q), and exempt from municipal taxes.

Kerr, Q.C., for the appellant.

R. Roy, Q.C., for the respondents.

COUNTY OF OTTAWA v. THE MONTREAL, OTTAWA AND
WESTERN RAILWAY COMPANY.

*Municipal corporation—By-law to deliver debentures—Breach of by-law—
Action by claimant of debentures.*

The Corporation of the County of Ottawa, under the authority of a by-law, undertook to deliver to the Montreal, Ottawa and Great Western Railway Company for stock subscribed by them two thousand debentures of the corporation of \$100 each, payable twenty-five years from date, and bearing six per cent. interest, and subsequently without any valid cause or reason refused and neglected to issue the debentures. In an action for damages brought by the railway company against the corporation for breach of this covenant,

Held, affirming the judgment of the Court below, that the corporation was liable. Arts. 1065, 1070, 1073, 1840 and 1841 reviewed.

Laflamme, Q.C., for the appellants.

De Bellefeuille, for the respondents.

BLACK v. WALKER.

*Sale of goods—Payment by means of simulated deed—Effect of fraud—Art.
993, C. C.*

On 16th April, 1879, B. and others sold to one Roy an insolvent, by notarial deed certain immoveable property which they owned in the city of Montreal, and in the deed falsely stated that they received from Roy \$300 cash on account of the purchase money, and took an obligation and hypothèque for the balance of the alleged purchase price. In May, 1879, B. and others made an agreement with W. (respondent), for the sale of goods of the value of \$2,000 and offered in payment the first two instalments of Roy's obligation and hypothèque, and at the same time represented that Roy was solvent. Roy never had possession, and B.

and others continued to deal with the property as their own. W. accepted the obligation and hypothèque in payment of the goods and the transfer was made on the 5th May, 1879, was registered on the 23rd July, 1879, was accepted by Roy on the 7th May, 1879, receiving assurances at the same time from B. and others that he would never be troubled in the matter. In an action brought by W. against B. and others to recover from them the amount of their indebtedness to him for the goods sold, and to declare the deed of obligation and hypothèque transferred to him null and void by reason of fraud,

Held, affirming the judgment of the Court of Queen's Bench, that as the deed to and obligation from Roy to B. and others were simulated and fraudulent, that the deed of obligation and hypothèque transferred by B. and others, to W. in payment of the goods purchased by them was null and void by reason of fraud.

Geoffrion, Q.C., and Davison, Q.C., for the appellants.

L. N. Benjamin, for the respondent.

COLLETTE v. LASNIER.

Patent of invention—Validity of prior patent—Measure of damages.

In 1877 L., a candle manufacturer, obtained a patent for new and useful improvements in candle making apparatus. In 1879 C., who was also engaged in the same trade, obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent, and prayed that C. be condemned to pay him \$13,000, as being the amount of profits alleged to have been realised by C. in making and selling candles with his patented machine, and also \$10,000 exemplary damages. C. contended that his patent was valid as a combination patent of old elements, and also that L.'s patent was not a new invention. The Superior Court on the evidence found that C.'s patent was a fraudulent imitation of L.'s patent, and granted an injunction, and condemned C. to pay L. \$600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench (appeal side). At the trial there was evidence that there were other machines known and in use for making candles, and there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent, and that L.'s trade had been increasing. On appeal to the Supreme Court of Canada it was

Held, affirming the judgments of the Courts below, Henry, J., dissenting, that L.'s patent had been infringed.

Held, also, reversing the judgment of the Court below, that the profits were not a proper measure of damages in the case, and that on the evidence only \$100 should be awarded for the infringement.

Lacoste, Q.C., for the appellant.

Geoffrion, Q.C., and *Robidoux*, for the respondent.

LORD v. DAVIDSON.

Charter party—Deficient cargo—Dead freight—Demurrage.

By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days demurrage were agreed on over and above lying days at forty pounds per day. Penalty for non-performance of the agreement was estimated amount of freight. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit. The ship was ready to receive cargo on 15th November, 1880, at 11 a.m., and the appellants began loading at 2 p.m. on 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further the captain refused to take any more in the forward hold. No other cargo was ready, as the respondents would not put the rye anywhere but in the forward hold, and they stopped loading. At 8 a.m. on the 19th, the loading recommenced and continued night and day until 6 a.m. on Sunday the 21st, at which time the vessel sailed in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel could have been loaded on the 19th night. The respondent sued the appellants because the ship had not received a full cargo, and claimed 2½ days 15th, 16th, and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended that delay was not due to them but to the ship, in not supplying baggers and sewers to bag the grain. That the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight.

The Superior Court gave judgment for the respondents for the dead freight, but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court below, that, as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for

damages, and that the agreed freight which the plaintiff as the Master provided for the amount of damages, the proper measure of the appellants claim was the amount of agreed freight which this would have earned upon the deficient cargo.

That the demurrage mentioned in the charter refer to and are over and above the laying days, and have no reference to the loading of the ship.

Kerr, Q.C., for the appellants.

Abbott, for the respondent.

DORION v. DORION.

Curator to a substitution—Rights of action—Intervention by a plaintiff in another capacity when irregular—Art. 154 C. C. P.

Held, affirming the judgment of the Court below, that a curator to a substitution has no right of action to recover from a curator in whose stead he was appointed any moneys due by the latter and belonging to institutes.

Held, also, that an assignee of the institutes has no right to intervene in an action brought by said assignee in his capacity of curator to the substitution, and in which no final judgment could have been obtained which could impair the legal rights of the institutes.

Semble, that an intervention filed when the action has been heard on the merits, and the case is *en delibere* is irregular.

Madore, for the appellant.

Pagnuelo, Q.C., for the respondent.

PINSONNEAULT v. HEBERT.

Possessory action—Equivocal possession—Right of way.

In a possessory action brought by H. against P., the latter denied H.'s possession, and pleaded *inter alia* that he was proprietor, and had exercised a right of way over the lands in dispute for a number of years. The land in dispute consisted of a roadway situated between the adjoining properties of the plaintiff and defendant. At the trial P. (the defendant), proved his title. H. (plaintiff), proved that he had had possession for a year by closing up the roadway with a fence and putting his cattle there, and that at times he allowed the defendant and others to use the roadway to get to the river, but that when the defendant took down the fence he immediately restored it, and that the defendant then asked him to let him use it. That it was after the defendant had again taken forcible posses-

sion of the land that he instituted against him the present action. The Courts below held that both parties had only proved an equivocal possession, and dismissed the plaintiff's action, and ordered that their rights should be tried by an action *au petitoire*. On appeal to the Supreme Court of Canada,

Held, Fournier, J., dissenting, that as P. had proved a possession *animo dominii* for a year and a day, he should be reinstated and maintained in peaceable possession of the land, and that H. be forbidden to trouble him by exercising a right of way over the land in question, reserving to the latter his recourse to revendicate *au petitoire* any right he might have.

Pagnuelo, Q.C., for the appellant.

Beique, for the respondents.

BANK OF TORONTO v. LE CURE & LES MARGUILLIERS, &c.,
OF THE PARISH OF THE NATIVITY.

Appeal—42 Vict. cap. 39, sec. 8—Action hypothecary for church rates under \$2,000 not appealable.

Under the 8th section of 42 Vict. cap. 39 the appealable amount in cases coming from the Province of Quebec is \$2,000, but an appeal is also permitted in cases wherein the matter in controversy does not amount to the sum or value of \$2,000 if the matter relates to "any title to lands or tenements, annual rents, or such like matters or things where the rights in future might be bound."

A church rate for less than \$2,000 was assessed on a certain property in the Parish of Nativity, and the amount of the first instalment was \$165. The Bank of Toronto subsequently became proprietor of this land, and in an hypothecary action brought by respondents against them to enforce the payment of the \$165, the Superior Court at Montreal held that the Bank of Toronto were liable; the Court of Queen's Bench (appeal side) affirmed the judgment. On appeal to the Supreme Court of Canada,

Held, that the case did not come within 42 Vict. cap. 39, sec. 8, and was not appealable.

Laflamme, Q.C., for the appellants.

Archambault, for the respondents.

NEW BRUNSWICK.]

SOVEREIGN FIRE INS. CO. OF CANADA v. PETERS.

Fire Insurance—Condition in policy—Not to assign without written consent of company—Breach of condition—Chattel mortgage.

A policy of insurance against loss or damage by fire contained the following provision :—" If the property insured is assigned without the written consent of the company at the Head Office endorsed hereon, signed by the Secretary or Assistant Secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease."

Held, affirming the judgment of the Court below, that a chattel mortgage of the property insured was not an assignment within the meaning of such condition.

Lash, Q.C., for the appellants.

Hannington, for the respondents.

ONTARIO.

High Court of Justice.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 3RD DECEMBER, 1885.]

RATTE v. BOOTH.

Riparian proprietor—Reservation in patent of rights of navigation—Ownership of land covered with water—Navigable waters—Nuisance—Damages—Injunction—48 Vict. cap. 24 (O.)

The judgment of Proudfoot, J., ante, p. 85, was reversed.

Per Boyd, C.—The effect of the patent is to convey the dry land and the land covered by water two chains out to the rights of the public in the Ottawa as a navigable river. As to the land bordering on the water the plaintiff is a riparian proprietor, and has the right to have the water in front of him open for all navigable purposes, and to enjoy it free from extraordinary impurities. Even if the land under the water is vested in

the plaintiff's grantor, he could not derogate from his grant to the water's edge by polluting filling up or otherwise cutting off his grantee from the beneficial enjoyment of the river; still less can the defendants be protected in their wrong doing. The grant to the patentee of the river bed two chains out carries as parcel of it the water thereon so that the bed, the bank and the water are vested as private property in the patentee subject to the servitude of a common public right of way for the purposes of navigation.

The term "navigable waters" in the patent is to be construed as referring to water of such a depth and situation as is according to the reasonable course of navigation in the particular locality practically navigable. The patentee may rightfully use and occupy the land covered by water, but only so much as will not interfere with the public easement; but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance. There is no evidence to shew that the plaintiff's structure (a boathouse) is a nuisance, and whatever may be the nature of the plaintiffs title or occupancy of the water it is enough that his possession and business are as against the public legitimate in order to entitle him to recover as against a wrong-doer. Even if the plaintiff's place of business was proved to be a nuisance because it invaded the navigable waters of the river, it does not follow that that disposes of the plaintiff's claim for an injunction and damages as he might well invoke the maxim *injuria non excusat injuriam*.

Per Ferguson, J. There is nothing either on the face of the conveyance to the plaintiff or in the surrounding circumstances at the time of its execution to indicate that the grantor intended, if intention could now be of any consequence, to reserve to himself the part of the lot under the water or any right or title to it; the contrary would rather appear from his being in possession at the time and having a boathouse situate as the present one is.

By the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank, but subject to the right of navigation expressed in the patent. What the plaintiff has done is no nuisance, nor is it shown that he has caused any injury to navigation and he is entitled to redress for the grievances of which he complains.

Even if the plaintiff is not the owner of the land under the water, he is entitled to redress for the injuries he has sustained as a riparian proprietor merely.

MacLennan, Q.C., for the plaintiff.

McCarthy, Q.C., and *Gormully*, for the defendant.

IN CHAMBERS.

[WILSON, C. J., 30th MARCH, 1885.]

ARMSTRONG v. DARLING.

Arbitrator—Compensation—Day's sitting—R. S. O. cap. 64.

The day's sitting upon arbitrations mentioned in schedule B to R.S.O. cap. 64, which is to consist of not less than six hours, is to be computed by the numbers of these sittings of at least six hours duration. whether these are held upon the same natural day or upon different days, and the compensation to the arbitrators is to be reckoned on that footing.

 MANITOBA.

In the Queen's Bench.

*In re LAROCQUE.**Partition act and orders—Statutes.*

By a general order of the court, a summary method for effecting a partition by means of a petition was permitted. Subsequently an Act was passed providing for partition proceedings by bill.

Held, that the Act must be construed as putting an end to the former procedure.

 ONTARIO BANK v. SUTHERLAND.
Striking out defence for non-attendance for examination.

An order was made to examine the defendant on 12th June. On 26th June an application was made to strike out the defence on the ground that the defendant had not attended. An order was made extending the time for the defendant to attend. On 13th November another application was made on account of further default, and the order was made, but not to be taken out until the 20th, to give the defendant an opportunity to

return from Ontario and submit to be examined. He did not return and the order was issued striking out the defence and allowing the plaintiff to sign judgment. The excuse offered was that the defendant had before leaving for Ontario offered to attend but that the solicitors could not arrange a time suitable to all.

Held, Taylor, J., dissenting. affirming the order of Taylor, J., (i) That the order should be affirmed; (ii) varying the order of Taylor, J., that it should not have contained leave to sign judgment, but should have been limited to striking out the defence.

In re MONKMAN & GORDON; THE MERCHANT'S BANK,
GARNISHEES.

Bailiff—Debtor to execution creditors—Garnishee process.

An appeal from an order of the Referee affirmed by Taylor, J., directing the garnishees to pay over money due to one Robinson the debtor of Monkman & Gordon.

Robinson was a County Court bailiff. He kept an account in The Merchants' Bank, in the name of The County Court Trust account, W. P. Robinson, High Bailiff. In this he deposited moneys made under County Court executions, and under landlords' warrants as well as some private moneys. He drew against the account for his private purposes but said that at the end of each month he made up the balance to the amount which he should have on hand for the County Court. The Bank set up that Robinson was a trustee of the money.

Held, that a bailiff or sheriff is debtor to, and not trustee for, the execution creditors; and that the order for payment should be affirmed.

G. N. W. JOINT STOCK BUILDING & LOAN SOCIETY v.
SPRAGUE.

Company—Action for calls on stock—Subscription before incorporation.

Action for calls upon shares. Defence that the defendant never was a shareholder. The evidence showed that the defendant subscribed for shares about six months before the incorporation of the Company. There was no other subscription.

Held, that the defendant was not shown to have become a shareholder.

McFIE v. HURON.

Capias—Arrest—Discharge of bail for delay.

A writ of *capias ad respondendum* was issued on 9th May, 1885; the defendant was arrested on 11th May, and special bail almost immediately put in; declaration filed, 37th October; pleas filed, 30th October; issue joined 2nd November. The plaintiff did not go down to trial at the November assizes. By 48 Vict. cap. 17, sec. 95, "In case any defendant shall be arrested at the suit of any plaintiff, it shall be the duty of such plaintiff to proceed to judgment, and to charge such defendant in execution with all reasonable despatch, any law, usage or custom to the contrary, notwithstanding."

Upon a motion to discharge the bail because of delay,

Held, (i) that this provision only applied when the defendant was in close custody; (ii) that apart from this provision the plaintiff had the usual period within which to declare and proceed to trial; (iii) that there had not therefore been any delay, and the bail should not be discharged.

THE CANADIAN LAW TIMES.

VOL. VI.

MAY, 1886.

No. 7.

DISTRESS CLAUSES IN MORTGAGES.

THE numerous inquiries which are from time to time made with regard to the fate of *The Trust and Loan Company v. Lawrason* lead to the belief that a discussion of the questions involved in that case and of certain cognate questions would be of general interest to the profession, notwithstanding the Act passed at the last Session of the Ontario Legislature, providing that as to all mortgages which shall be made after the passing of that Act, the right of the mortgagee to distrain for interest in arrear upon a mortgage shall be limited to such of the goods and chattels *of the mortgagor* as are not exempt from seizure under execution.

That case involved the discussion of the right of a mortgagee to distrain the goods of a third person upon the mortgaged premises, by virtue of a tenancy created or attempted to be created as between the mortgagor and the mortgagee by an attornment clause in the mortgage, and also by virtue of an express power of distress contained in the mortgage deed.

The history of the case is a somewhat curious one, as the case was prosecuted for the purpose, among other things, of settling the points of law raised in *The Royal Canadian Bank v. Kelly* (a), in which case the question involved was

(a) 19 C. P. 196, 430.

whether or not such right of distress against the goods of a third person upon the mortgaged premises was given to the mortgagee by virtue of that clause in the statutory short form of mortgage which is known as the distress clause. That clause, as extended in the schedule in the Act (b), is as follows:—"And it is further covenanted, declared and agreed by and between the parties to these presents that if the said mortgagor, his heirs, executors, or administrators shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant to recover, by way of rent reserved, as in the case of a demise of the said lands, tenements, hereditaments and premises so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent."

It was in that case contended, on behalf of the mortgagee, that the said clause, coupled with the usual possessory clauses contained in the statutory short form of mortgage, did in fact create the relationship of landlord and tenant between the mortgagor and mortgagee; for the granting part of the mortgage conveyed the land to the mortgagee, the possessory clauses entitled the mortgagor to possession of the land until default should be made in payment; and the distress clause provided that the mortgagee might distrain for the interest and recover the same *by way of rent reserved*. It was contended, on the other hand, that the provisions of the mortgage did not create the relationship of landlord and tenant between the mortgagor and mortgagee, and that the distress clause operated simply as a personal license from the mortgagor to the mortgagee that it should be lawful for the latter to distrain upon the goods of the former.

(b) R. S. O. cap. 104, Schedule B. clause 15 of column 2.

It was decided in the Court below, in the *Royal Canadian Bank's* case, that the full relationship of landlord and tenant was created by the mortgage, and that by reason thereof the mortgagee was entitled to distrain not only the goods of the mortgagor but also the goods of a third person upon the mortgaged premises.

This case was carried to the Court of Appeal, and the judgment of the Court below was reversed; but as the judgment of the appellate court was lost, and was therefore never reported, the grounds of the decision in that Court were known to the public in so far only as they were suggested in the communication of Mr. Leith, one of the counsel in this case, to *The Canada Law Journal* (c).

It was deemed that the fate of this case had left the broad question involved therein unsettled, as it seemed quite probable that the decision of the Appellate Court had not determined the one question involved which was of general interest, namely, whether or not the mortgage in question did create the relationship of landlord and tenant between the mortgagor and mortgagee at a fixed rental.

While the authorities were in this position, the circumstances occurred which gave rise to the case of *The Trust and Loan Co. v. Lawrason*, and these facts, shortly stated, are as follows.

A mortgage was made upon certain land in favour of The Trust and Loan Company. This mortgage was in the ordinary statutory short form, to which was added a clause that the mortgagor "doth attorn to, and become tenant at will to the Company subject to the said proviso" (namely, the proviso for payment of principal and interest).

The interest secured by the mortgage was allowed to fall into arrear, and the Sheriff of the County in which the lands lay, during the possession of such lands by the mortgagor, seized the goods of the mortgagor then being upon the mortgaged premises, which seizure was made under and by virtue of certain executions placed in his hands by judgment creditors of the mortgagor.

The mortgagees, before sale and while the said goods were under seizure, gave notice to the Sheriff that they claimed to be landlords of the mortgagor, who was their tenant, and that there was due to them, and payable by the mortgagor, a sum exceeding one year's rent of the said lands, and that they required the Sheriff, before removing any of the said goods and chattels, to pay to them the amount of one year's rent of the said lands for the year next preceding the giving of such notice.

This notice was served upon the sheriff for the purpose of taking advantage of the provisions of 8 Anne cap. 14, sec. 1, which enacts that "no goods or chattels whatsoever lying or being in or upon any messuage lands or tenements which are or shall be leased for life, or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels by virtue of such execution; provided that the said arrears of rent do not amount to more than one years rent."

The execution creditors disputed the right of the mortgagees to be paid the year's interest as rent which was claimed by them, on the ground that the mortgage in question did not create the relationship of landlord and tenant between the mortgagor and mortgagees at a fixed rental; and the sheriff thereupon interpleaded, and a special case was submitted for the judgment of the Court of Queen's Bench, before which Court it was contended on behalf of the mortgagees that they were entitled to avail themselves of all the arguments submitted on behalf of the mortgagee in the Bank Case, and that the position of the mortgagees herein was strengthened by the additional fact that their mortgage contained the said attornment clause. The judgment of the Court of Queen's Bench was in favour

of the mortgagees (*d*), and the execution creditors thereupon appealed to the Court of Appeal, where the judgment of the Court below was reversed (*e*), Burton and Patterson, JJ.A., delivering the judgment of the Court, Morrison, J.A., concurring, and Osler, J., dissenting. The mortgagees then carried the case to the Supreme Court of Canada, but their appeal failed by reason of that Court being equally divided; Ritchie, C.J., and Gwynne and Taschereau, JJ., being in favour of allowing the appeal, and Strong, Fournier and Henry, JJ., being in favour of dismissing it (*f*).

There are numerous general propositions of law relating to the subject now under discussion, that were scarcely controverted by any of the learned judges who delivered opinions in that case, which turned upon the construction of the particular form of mortgage there in question; the chief point in controversy then being, did the form of mortgage in question create the relationship of landlord and tenant at a rent certain as between the mortgagor and mortgagees.

We shall first formulate and classify, amongst others, the general legal propositions referred to, and will then discuss the question of the construction of the particular instrument.

The relationship of landlord and tenant may be created between mortgagor and mortgagee.—It is now settled beyond any doubt that a mortgage may be so framed as to create the relationship of landlord and tenant between a mortgagor and a mortgagee, so that by virtue thereof the mortgagee may acquire all the rights and remedies which a landlord acquires under or by virtue of an ordinary demise, including the right to distrain upon the goods of a third person being upon the mortgaged premises. The authorities in support of this will be cited under our next proposition.

(*d*) 45 U. C. R. 176.

(*e*) 6 App. R. 286.

(*f*) The judgment of that Court has after the lapse of several years been recently reported in 10 S. C. R. 679.

Such tenancy may be created by an attornment clause.—An attornment is an acknowledgment by a person that he is tenant of and holds under a landlord, and is usually executed by the tenant only and not by the landlord. It was therefore argued that the tenancy thereby created was one by estoppel only, and that whatever rights such an acknowledgment might give to the landlord as against the tenant by estoppel, it could give no rights as against third persons who were not concluded by the estoppel, and that a landlord could not under a tenancy so created distrain upon the goods of a third person. In support of this view it was urged that the attornment might be made to a person who had no estate or interest in the lands in question, and that it would not be just to give to such a person the summary remedies which the law gives to landlords. It was further urged that the same person might attorn to several persons with respect to the same land, and that there might therefore be created several co-existing tenancies of the same land, and that it could never have been intended that there should be several landlords of the same land at the same time, all of whom could be entitled to distrain, even upon the goods of third persons for rents which had accrued to the several landlords during the same period of time. In practice in this Province the mortgage instrument is rarely executed by the mortgagee, and a tenancy created by an attornment clause in a mortgage would therefore usually be open to the above objections if they were entitled to prevail.

Lord Justice Thesiger, delivering judgment in *Ex parte Jackson, Re Bowes (g)*, says: "There can be doubt that such clauses contained in mortgage deeds are valid and operative in themselves, and that they may, and ordinarily do, create the relationship of tenant and landlord between the mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches to that relationship."

And Brett, M.R., delivering judgment in the Court of Appeal, in *Kearsley v. Phillips* (h), says : “ I think that the passage in the note to *Keech v. Hall* (i) is correct ; it is as follows : ‘ A mortgage deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent ; or a power enabling the mortgagee to distrain for interest, by which no tenancy is created. The object of such provision is generally to further secure the payment of the interest, an object more completely effected by adopting the former than the latter mode of framing the deed ; because, whilst the former makes the mortgagor tenant at will only to the mortgagee, so that his interest may be put an end to by demand of possession, and at the same time creates a rent properly so called with all its incident remedies, the latter mode operates merely by way of personal license from the mortgagor and affects his interest only.’ * * * The question is whether upon the deed before us the mortgagee has all incident remedies for the recovery of the rent ; and to my mind *Morton v. Woods* (j) shows that the ordinary relation of landlord and tenant has been created between the parties, and that the right of distress exists. *Anderson v. Midland Ry. Co.* (k) is a clear authority to the same effect, and it shows that the relation of landlord and tenant exists at common law as well as in equity ; and the landlord has the power of distraining even in cases of fraudulent removal.” In *Morton v. Woods* (l), it is said : “ The case of *West v. Fritche* (m) shows that where there is a deed of this description, although it is not executed by the mortgagee, yet the mortgagor *having attorned and occupied after the deed was executed by him*, the relation of landlord and tenant is created.”

(h) 11 Q. B. D. at p. 624.

(i) 1 Sm. L. C. 8th Ed.

(j) L. R. 4 Q. B. 293.

(k) 3 E. & E. 614.

(l) L. R. 3 Q. B. at p. 667.

(m) 3 Ex. 216.

Such attornment operates by estoppel.—In the case of *Morton v. Woods* already referred to, it was contended that as there was a prior outstanding mortgage of the premises in question, and the mortgagor had therefore only the equity of redemption in the mortgaged premises, he had no legal reversion to grant and consequently the second mortgagees who were claiming the right of distress had no legal reversion so as to be able to distrain. Cockburn, C.J. (n) says: "That argument I think well founded so far as it goes, that no legal reversion was in the defendants, but the answer is, that although it may appear on the face of the deed that the defendants, the lessors, have not the legal estate, yet the tenant and those who claim through him are estopped after he has attorned from denying that the relation of landlord and tenant existed between the defendants and the mortgagor, so as to pass, as between them, the reversion into the lessor."

And Blackburn, J., in the same case (o) says: "Then comes the second objection that a considerable portion of the premises was already mortgaged, and the mortgagor had only the equity of redemption, and it was contended, and rightly, that there must be a reversion in order to give a right of distress; but then there may be a reversion by estoppel; that is *when one party is let into possession by the other* under an agreement that one shall be tenant and the other landlord, both parties are estopped as between themselves from denying the other's title. But in answer to that it is said that in the present case it is disclosed on the face of the instrument evidencing the agreement of the parties that the mortgagee had not the legal estate; but I do not see on principle why that should make any difference. The principle is, that if it is agreed that one shall be tenant to the other, both are estopped from disputing the other's title as landlord, and even though it be expressly stated that the landlord has no legal estate, still if they agree that the relation of landlord and tenant shall be created, and

(n) L. R. 3 Q. B. at p. 667.

(o) L. R. 3 Q. B. at p. 669.

this agreement is carried out by the one being let into possession, as between them the relation of landlord and tenant is created, and they are just as much estopped as if there had been no such statement."

In the same case of *Morton v. Woods*, on appeal to the Court of Exchequer Chamber (*p*), Chief Baron Kelly says: "And first as to the objection that the defendants, not having the legal estate, could have no right of distress. That they had not in fact the legal estate is clear; but that may be said of all lessors where there is a lease and a tenancy by estoppel, and where the lessors have frequently no title at all; here the defendants have an equitable title only, and the question becomes of primary importance, because it is only by estoppel that the defendants can be said to have the legal estate, and it is said that no estoppel arises where the truth appears upon the face of the instrument which is the evidence of the agreement between the parties: and it may be taken as appears on the mortgage deed, that the defendants were not seized of the legal estate, but that it was in the first mortgagee." His lordship then proceeds to discuss the prior cases bearing upon the question and concludes by saying, "We therefore hold that the right of distress so far as this point of the want of legal estate is concerned, is unaffected by the fact that such want appeared on the agreement by which the relation of landlord and tenant was created between the parties."

In delivering judgment in the Court of Appeal in *Ex parte Voisey, Re Knight* (*q*), Jessel, M.R., says: "It was said that there was no tenancy at all because you cannot make a tenancy except by agreement, and that as the mortgage deed was not executed by the mortgagees there is no agreement. The fallacy of that argument appears to me to be in confounding agreement with evidence of agreement, certainly there must be an agreement or else you cannot have a tenancy, but an attornment may be evidence that the landlord has entered into an agreement for a tenancy.

(*p*) L. R. 4 Q. B. at p. 303.

(*q*) 21 Chy. D. at p. 456.

In this case we have an attornment to the legal owner by deed *executed by the tenant in possession* and delivered to the legal owner—very good evidence of a tenancy—evidence therefore of an agreement for a tenancy, and, as was said in *Ex parte Punnett* (r), that is an estoppel *in pais*, which would prevent the tenant from denying the tenancy. Therefore there is in this case a well created tenancy.”

Brett, L.J., in the same case, says (s) : “ Now, the stipulation which is called an attornment, if it be a *bona fide* and an honest transaction is a contract in writing between the two parties to it. It is signed by only one of them if you please, but it is delivered by that person to the other, and kept by him, and the intention of it is that it shall form a contract ; and if that be so, it is a contract.”

A tenancy by estoppel will not authorize the landlord by estoppel to distrain the goods of a third person where the tenancy was created simply as a security and for the purpose of enabling the landlord to seize such goods and was therefore not a *bona fide* tenancy (t).

It is not necessary that there should be an actual letting into possession after the attornment.—It might be suggested that in order to create a tenancy by estoppel as against the mortgagor it would be necessary, not only that the mortgagor should execute the attornment clause, but also that he should act thereon by changing his position and actually going into possession under the authority and with the leave of the mortgagee, and that therefore there can be no effectual tenancy created by estoppel where the mortgagor was in possession before the time of the attornment, and, after the attornment he simply remains in possession, doing no act that would indicate any change in the condition of his holding save only the execution of the attornment clause. The cases, however, show that this position is not tenable. In *Morton v. Woods* (u) Blackburn,

(r) 16 Chy. D. 226.

(s) At p. 457.

(t) *Thomas v. Cameron*, 8 O. R. 441.

(u) L. R. 3 Q. B. at p. 670.

J., says, "There was no letting into possession here, but there was what amounted to the same thing, a continued occupation, instead of a change of possession and then a letting into possession again. This very principle has been acted upon in two cases, *Dancer v. Hastings* (v), and *Jolly v. Arbuthnot* (w); and I think they fully entitle us to decide in favour of the defendants."

In the same case (x), Lush, J., says: "In the present case the mortgagor did not go out and receive possession from the mortgagees; but that formal ceremony was not necessary, because he attorned to the defendants, and he must therefore be in the same position as if he had gone out and come in again." And Cockburn, C.J., in the same case (y), says, "The case of *West v. Fritche* (z) shows that where there is a deed of this description, although it is not executed by the mortgagee, yet the mortgagor having attorned and occupied after the deed was executed by him, the relation of landlord and tenant is created."

There may be several attornments to several mortgagees.—One peculiarity with regard to these attornment clauses in mortgages is that, as there may be several mortgages upon the same property at the same time, given to different persons, and each containing an attornment clause, it follows that there may be several persons, each of whom may be entitled to distrain upon the goods of all persons being upon the mortgaged premises, for the purpose of satisfying rents accruing to them in respect of the same lands, and during the same period of time. That this is so, is established by the judgment of the Court of Appeal in England, in the case of *Ex p. Punnett, Re Kitchen* (a), in which case Jessel, M.R., says: "If the second mortgage created the relation of landlord and tenant, which it did by the operation of a legal fiction (I am not at all finding

(v) 12 B. Moo. 34.

(w) 4 De G. & J. 224.

(x) At p. 671.

(y) At p. 667.

(z) 3 Ex. 216.

(a) 16 Chy. Div. 226.

fault with legal fictions, they are necessary for the purposes of justice, they are merely a mode of putting in legal form the contracts of the parties); if that is so, does it make any difference that there was a prior attornment to a prior mortgagee? I do not see how it can. If by a contract, notwithstanding the fact is known that the legal estate is outstanding in a mortgagee, and that the mortgagor is not really the owner of the reversion, you can create a tenancy between the second mortgagee and the mortgagor by what may be called estoppel, or *quasi* estoppel (it does not matter what term we use), it appears to me that there is nothing either in law or in good sense to prevent the same arrangement being made with more than one mortgagee. Otherwise this would happen: if a mortgage were made to two mortgagees by the same deed, and the mortgagor were to attorn tenant to the two mortgagees, there being a proviso between themselves that the one should be first and the other second, that would be good; but if the one mortgage were made by a deed dated the day after the other, it would be bad. It appears to me that that would be a mere over-refinement; and consequently, having regard to the decisions which I have mentioned, I think that the right to distrain exists, and that effect ought to have been given to it."

A mortgage with such a clause need not be filed as a bill of sale or chattel mortgage.—It has been held by the Court of Appeal in England that, although an attornment clause in a mortgage may, on the happening of certain events, give the mortgagee a charge upon the goods and chattels upon the mortgaged premises, yet it is not such a charge as comes within the provisions of the English Bills of Sale Act, 1854. Baggallay, L.J., giving judgment in *Ex p. Jackson, Re Bowes* (b), speaking of the exercise of such a power of distress, says: "To the extent to which it was exercised the mortgagee was enabled to treat the chattels of the mortgagor as forming a portion of his security, and in a sense as the law then stood to evade the provisions of

(b) 14 Chy. Div. at p. 733.

the Bills of Sales Act of 1854. I say as the law then stood, because in *Re Stockton Iron Furnace Company* (c), to which I shall have occasion to refer more particularly presently, it was held that such a clause was not a license or authority to the possession of chattels within the intent and meaning of the Bills of Sale Act, 1854, which was then in force." His Lordship then points out that by subsequent legislation in England any attornment not being a mining lease whereby a power of distress is given by way of security for an indebtedness shall be deemed to be a bill of sale within the meaning of the Act.

Whatever may have been the doubts upon the subject created by the phraseology of the English Bills of Sale Act, 1854, one would have thought that there could be no room for argument, that such a clause comes within the provisions of our chattel mortgage Act (d), were it not for the fact that Cameron, J., in delivering judgment in *Trust & Loan Co. v. Lawrason* (e), intimates a sort of notion that perhaps such a clause does come within the provisions of the Act. The test is this: is the clause in question a "mortgage or conveyance intended to operate as a mortgage" of goods and chattels? In answer to this query it may be pointed out that the clause effects no conveyance whatever of any goods, nor does it create any present lien thereon. Moreover, there is no equity of redemption in the goods properly so called created by the clause, and no goods whatever are therein mentioned or referred to. The cases of *Patterson v. Kingsley* (f), *McMaster v. Garland* (g), *Walker v. Hyman* (h), *Nordheimer v. Robinson* (i), and numerous other cases, show that an instrument to be avoided by the Chattel Mortgage Act must be strictly

(c) 10 Chy. Div. 335.

(d) R. S. O. cap. 119.

(e) 45 U. C. R. 186.

(f) 25 Gr. 425.

(g) 31 C. P. 320; 8 App. R. 1.

(h) 1 App. R. 345.

(i) 2 App. R. 305.

within its terms. The Court of Appeal in *Trust & Loan Co. v. Lawrason* (j), do not give any any encouragement to the view that such a clause is within the provisions of the Chattel Mortgage Act. Burton, J.A., (k) says: "I entirely agree that if upon a proper interpretation of this mortgage—treating it as a mortgage in the extended form—it can be read as reserving the interest or a sum equivalent to the interest as rent reserved, it is not open to the objection of being invalid, either as in fraud of creditors or an evasion of the Chattel Mortgage Act, and that the mortgagees as landlords would be entitled to seize the goods of a stranger upon the premises."

As the cases all show that such an attornment clause when properly drawn does create a real tenancy at a real rent, one is at a loss to imagine any argument which could be adduced in favour of holding such a clause to be within the operation of the Chattel Mortgage Act, which would not equally apply in favour of the position that all leases are within the provisions of that Act.

A. H. MARSH.

TORONTO.

(*To be continued.*)

(j) 6 App. R. 286.

(k) At p. 295.

EDITORIAL REVIEW.

Forensic Eloquence.

The *Law Times*, in voicing a lament upon the decay of forensic eloquence, lays the blame at the door of the judiciary. It says: "In these days we seldom hear a powerful address, except in a criminal court or from the mouth of counsel who speak with almost the same authority as a judge. But the cause of the failing is to be found not in the advocate but in the judge. Counsel, or some of them, do not lack ability to speak, but the opportunity of speaking without interruption from the Bench. A striking example of our meaning has occurred during the past week. The Ex-Solicitor-General was addressing to the jury a powerful appeal for the defendant in *Bryce v. Rusden*. The action was brought by the native Minister of New Zealand against an historian, whom he charged with libel. Sir John Gorst had striven to justify the tone of the book by reviewing the policy of the New Zealand Government towards the natives; he then proceeded to expound his views of the law of libel—views which did not commend themselves to Baron Huddleston. We are not concerned at this moment with the accuracy of Sir John Gorst's proposition, but with the fact that the learned Judge thought fit to interrupt the flow of the speaker's eloquence by a reference to the authorities. This is a matter of every day occurrence. A fervid oration is stopped, or a clear argument is obscured, for no better reason than that some incidental point occurs to the presiding judge. A desultory discussion follows, and the jury are removed from the influence of the speaker, or lose the thread of the argument. We maintain that this practice, besides robbing proceedings in a Court of justice of such attractions as they might otherwise possess, causes a weary waste of time. In the long run the speaker will not be denied, and the long deferred

argument will come out in fragments but not curtailed. Nor do we see that any danger of injustice would ensue if judges confined the half of the colloquial dicta in which they now indulge to their legitimate place, the summing up or the judgment. Such a reform would encourage a revival of forensic eloquence and immensely lighten the labours of those humble but useful animals, the reporters."

In this Province we believe that no fault can be found with the Bench at *nisi prius*, counsel being allowed the greatest latitude in addressing juries as long as they do not travel outside the evidence.

But in non-jury cases and before the full Courts interruption is most frequent. Not long ago it used to be said of one of the Divisions, that one only had to start a doubtful point and the members of the Court would argue it. The practice of interrupting counsel begets carelessness in the preparation of arguments. Young men, as a rule, prepare their arguments, but seldom deliver them as prepared, for the reason that by constantly being interrupted to answer questions or dispose of incidental points, the thread of the arguments is broken and not taken up again. Knowing this and knowing that it is useless to spend time again in preparing an argument which will never be delivered, the points are in future merely jotted down and delivered to the Court as opportunity offers.

There is nothing that shortens the merely voluble man's speech so much as silence. The more points you suggest to him the more he will argue, the longer he will talk, and the oftener he will repeat.

The Election of Benchers.

The quinquennial election of Benchers passed off rather quietly, and the very conservative feeling of the profession exhibited itself in the return of the old Bench with one exception—Mr. Crickmore retires in favour of Mr. Lash, Q.C.

A number of "tickets" were circulated all of which brought in votes, but as there was no concentrated movement in favour of any ticket, and there was no fault to be found with the old Bench, none of the tickets succeeded.

It is very questionable if the modern notion of electing the Bench is an improvement on the old system. If a new member is proposed, the existing Benchers look askance at the proposer and ask which of them is to be displaced in order to make room for a new member. If a member of the existing Bench expresses his opinion that it is entitled to the votes of the profession as a mark of their confidence, outsiders look askance at a man who suggests that once a Bencher always a Bencher. If an outsider proposes himself as a candidate people look askance at him for his forwardness. If some one else proposes him people look askance at him. And so dissatisfaction reigns until the election is over. And whatever movement is set on foot the result is always what might be expected, namely, that the complexion of the Bench remains unchanged; or such a slight change takes place that it is immaterial.

We do not think that there would be any great opposition to a restoration of the old system, however antiquated it may be in theory.

There is one matter which calls for reform at the hands of the Bench, and that is the appointment of scrutineers. There is an objection on principle to their appointing one of themselves to a position of emolument, however small the fees may be, though we cannot imagine that the performance of the duties is at all influenced thereby. There is an objection on principle, also, to the appointment of men to count the votes, who from their positions as Benchers are certain to have a number of votes cast for them. It would be better for both reasons that the appointment of Benchers as scrutineers should be avoided. But in addition to this, it is in the power of the Bench to do a generous act by appointing to the office two or three young barristers, who could do the work as well as it can be done, and who would be glad both of the employment and the remuneration. A little consideration in this respect would be much appreciated by the juniors; and we would not hear remarks made about Benchers counting their own votes and paying themselves for doing it.

Single Court.

While the circuits have been in full swing the sittings in single court of the Common Law Divisions have been entirely neglected. This is not attributable, we believe, to oversight or uncontrollable circumstances, but to a want of appreciation of the importance to the profession and the public of regularly holding the courts. The Chancery sittings are so arranged that one Judge shall always be in Toronto for the week's Court, and speaking from memory, we believe that in the past ten years the disappointments have not been more in number than two or three. The Common Law Divisions arrange their circuits apparently without regard for the weekly courts—if one may trust the circuit list—and it is a matter of course that there will be many disappointments.

For about five weeks no courts or judge's chambers were held at all, although twice or three times during that period there was at least one judge who was not engaged in another court on the regular days. Those who had cases on the paper attended regularly twice a week only to find that there would be no court—some of the counsel coming to Toronto from long distances. It is this latter circumstance that is creating a strong desire for an independent judicial district in the west.

It is high time that arrangements were made for the disposal of the week's business within the week, so that cases should not accumulate for weeks to the dissatisfaction and detriment of the profession and the public. There is no reason why the circuits should not be arranged so as to leave one or two Judges in Toronto for each week. If two cannot be spared, then the one who remains in Toronto should take all cases set down for the weekly court. However strong the feeling might have been against the Judicature Act in the first place, it has (as our American friends, or some of them, say) come to stay, and the demand of the whole profession is that its principles should be carried out to the fullest extent.

It seems absurd that one judge, whose commission reads in the same words as another, should take only such cases as by force of circumstances and not from choice or on account of the particular jurisdiction of his court are thrown in his way. When there is work to be done in the High Court, any Judge of the High Court should be at liberty to do it. If this arrangement is not made by rule of the Supreme Court of Judicature, it is sure to be made before long by act of the Legislature. We have before advocated sittings of the High Court on circuit instead of the present arrangement, and we now voice the feeling of the profession that there should be sittings of the High Court weekly without reference to the Divisions of the Court.

Another grievance of the profession respecting single court arises out of the present practice as to the signing of orders. The clerk who sits in Court has under the present practice nothing to do with signing and issuing them except reading them over, and ascertaining that they are in due form, and that the proper papers are filed. They are then signed by the Registrar of the Division in which the action is pending. As the Registrars do not wait on the Courts, but take their own time about leaving the Hall, it not unfrequently happens that orders cannot be issued on the day on which they are granted. In the Queen's Bench Division this is not the case, because by mere chance the clerk of the Court is also an officer of the Queen's Bench Division, and has authority to sign the name of the Registrar of that Division. But in actions in the Common Pleas Division it some times happens.

Quite recently a gentleman came from a long distance to move for an order for an arrest. Having obtained it he found that it could not be signed on that day, because the action was in the Common Pleas Division, and the Registrar of that Division had closed his office for the day. As the matter pressed he had to change the nature of his motion, move again before the Judge as in chambers, and take a Chamber order signed by the Judge. On the last court

day an order was made dissolving an injunction which had been granted to restrain a sale to take place the next day. The action was in the Common Pleas Division, and as the Registrar had closed his office for the day the order could not be signed.

Judges of the Supreme Court of Judicature would confer an inestimable boon on the profession if they would enquire into these matters and pass rules to meet the cases.

BOOK REVIEWS.

Institutes and History of Roman Private Law with Catena of texts. By Dr. CARL SALKOWSKI, Ordinary Professor of Laws in the University of Königsberg. Translated in full and edited by E. E. WHITFIELD, M. A., of Oriel College, Cambridge; member of the Incorporated Law Society. London: Stevens & Haynes. 1886.

The study of the Roman Law has never, from a time anterior to Bracton, been entirely neglected in England. The Clerical Chancellors were familiar with it, either in its original sources, or transmitted, with diversities, through the Canon Law. The close connection which they formed, without any necessity, between the canon and civil law begat a jealousy in the laity of England, and prevented the Roman jurisprudence from becoming the municipal law of the country. But a considerable part of it was secretly transferred into the practice of the Courts. How much was so transferred has been the subject of much discussion among recent writers. A summary may be seen in the recent work of Professor Scrutton on the influence of the Roman Law on the Law of England.

After laymen were appointed Chancellors they still referred for equitable principles to the civil law; and in other Courts than the Chancery recourse was had to the same source. The Consistory and Probate Courts, and the Admiralty Court were frequently guided in their decisions by that law. And many of the most distinguished Judges in the Common Law Courts, Holt, Hale, Mansfield and others were deeply imbued with its principles. So that at no time since its first introduction by Vacarius has the study of the Roman jurisprudence been entirely neglected.

In the present century attention has with renewed vigour been directed to the advantage, if not the necessity, of that study, to the formation of a scientific jurist, and authors of eminence have applied themselves to the production of works explaining and commenting on it. The various critical editions of Gaius, and the Institutes of Justinian, and the publication of some of the titles of the Digest, testify to the interest that has been excited in the study.

It was to be expected that advantage would be taken of the works of the many distinguished continental civilians who had devoted themselves to the historical and critical development of the Roman Law. Some of Savigny's works have been translated, and it is to be wished that they all were. But other authors of nearly equal eminence are only to be read in their native tongue.

The work of Salkowski has been translated by Mr. Whitfield, who says he found that best progress could be made through use of German treatises. The author states his design as follows:—"The present text book sets itself the task of grouping and setting forth in the briefest space possible and in a precise form the elements of pure Roman Law, as a guide for lectures upon the Institutes, in a comprehensive manner and according to their essential connection. It was not my object to compose a hand-book or literary work, which should lay the material before the reader with detailed exposition and in an easily intelligible way, adapted for reception at one's ease, but a text book by help of which the reader should *learn*; and which on that very account—starting from the principle that we can alone truly call our own what we have ourselves acquired—must make some demand upon independent study and the mental energy of the law student. My special object was, as far as possible, to make the sources speak for themselves." Preface xiv. One is rather startled at first view to think that a volume of 1,048 pages was required to set forth in the briefest possible form the elements of pure Roman Law. But upon inspection it appears that probably not one fourth of the book is the composition of the author.

The remainder consists of the texts of the law, cited in full in the original Latin, accompanied by a translation into English. Quoting the texts in full is of great advantage to those who have not access to the bulky volumes of the *Corpus Juris*, and the translation of them will be hailed as a positive boon by those who have not been much accustomed to the Latin of the jurisconsults, or who have grown rusty since leaving school or college.

The design of the author is carried out in a way that will render the further prosecution of the study, if not a matter of ease, yet a comparatively easy method of making the knowledge their own. There is much in the book that may be got in other works, but we are not aware of any single book where so much of value to the student is collected together. There is not much scope for originality in the treatment of the subject, every possible arrangement having been tried; but while one may be more logical than another there is very little gained by such logical sequence. In the division of his subject the author does not adopt that of Gaius and Justinian. He divides it into—1. The origination and maintenance of rights. 2. Law of Persons. 3. Property Law, (a) pure or simple Property Law; first, the Law of Things; and secondly, that of Obligations. (b) The Law of Family Property. (c) The Law of Inheritance. 4. The doctrine of the form of judicial enforcement of rights, or Procedure. The propositions of the author are concise, and appended to each is the full text of the laws cited to support them. And while the author seems to be fully acquainted with the latest writers, and aware of their differences, he does not, so far as we have noticed, enter into any of their controversies. We have glanced over the titles of Possession, and of Obligations, but have not met with any controversy on the many abstruse questions that have arisen upon them. It would have been contrary to the design of the work to do so.

The translation of the Latin texts seems to be very well executed in general; and the translator has added marginal references to the most recent writers.

Upon the whole we think this work a very useful one, and that it will be of great benefit to students desiring to become acquainted with the principles of Roman Private Law.

(Contributed.)

The Torrens System of Transfer of Land. A practical treatise on the "Land Titles Act of 1885," Ontario, and "The Real Property Act of 1885," Manitoba. Embracing the latest decisions both in England, Australia and Canada; together with a brief history of the origin and principles of the system: the forms, methods of administration, and copious index. By HERBERT C. JONES, Esq., of Osgoode Hall, Barrister-at-Law, etc., etc. Toronto: Carswell & Co. 1886.

The introduction of such a radical change in real property law as the Land Titles Act effected was sure to bring forth an expositor of the law. Mr. Jones' notes to the Act are chiefly historical. He sketches the efforts of land law reformers in England and Australia to release land from the thralldom of the feudal laws. The want of Australian reports was felt by the learned commentator in editing his book, and the want will be more greatly felt when the Act has been working for a time. The principle of the Act has been applied in British Columbia, but without making any alteration in the law of tenure. But until recently there have been no reports of the British Columbia decisions. For want of access to reports of decided cases the notes upon the construction of the Act are therefore less copious than one would have desired. The book will be a useful companion to practitioners who are engaged in registering land under the Act.

The Student's Kent. An Abridgement of Kent's Commentaries on American Law. By EBEN FRANCIS THOMPSON, with an introduction by Hon. T. C. NELSON, Judge of the United States District Court. Boston and New York: Houghton, Mifflin & Co. 1886.

No pretence to authorship is made by the editor. A good deal of discernment is necessary for the successful performance of the duty of condensing a work like Kent's. A hasty glance at this hand-book gives one the impression that the work of condensing the Commentaries has been performed judiciously.

We cannot hope, however, that any condensation of Kent could ever take the place of the original, or even furnish an introduction to it. Speaking with some experience of the troubles of students in mastering the elements of law, it seems that the condensed or digested works are, as a rule, stumbling-blocks to students. The propositions are generally too concise, too bald, to convey to the mind their full import, and an erroneous idea may thus be derived from their perusal which it may take years to eradicate. To one who can read between the lines a condensed work is of value, for it lightens labour by enlarging the range of mental vision, and for this we welcome the book.

The Canadian Franchise Act, with notes of decisions on the Imperial Acts relating to registration, and on the Provincial Franchise and Election Acts. With an appendix, containing the Provincial Franchises of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, and Prince Edward Island. By THOMAS HODGINS, M.A., one of Her Majesty's Counsel, and Editor of Hodgins' Election Cases, Manual on Voters' Lists, etc. Toronto: Rowsell & Hutchison. 1886.

Mr. Hodgins' work presents very copious references to Imperial and Canadian cases, while stating their effect

concisely. He discards many English cases which are deemed to be inapplicable to our Act, and gives many useful hints on its construction. The profession in Ontario are well aware of the learned author's peculiar qualifications for a work of this kind. The book is in handy form and will do valiant service before long.

The Other Side of The "Story," being some reviews criticizing "The Story of the Upper Canadian Rebellion"; also the letters in the Mackenzie-Rolph controversy, and a critique on "The New Story." By JOHN KING, Barrister. Toronto: James Murray & Co.

This is hardly a work that comes within the reviewing jurisdiction of a law magazine, though we may owe some constitutional benefits to the Rebellion. Mr. King's literary ability is well established, and we feel sure that the cause of his champion is well argued in this brochure.

Splinters ; or a Grist of Giggles. Toronto: Carswell & Co. 1886.

This is a collection of short stories connected with the law and clipped and culled from all sources, and is intended to find a place amongst works of recreation. It contains a good many familiar anecdotes, but a number that are new.

REVIEW OF EXCHANGES.

American Law Review—November-December, 1885.

The Pall Mall Gazette Exposures, and the Law of Consent in Criminal Cases, by HORTENSIVS. After an endeavour to extract, as nearly as possible, the particulars of the loosely drawn, though sufficiently infamous, charges of the *Gazette* against modern English society, the learned writer proceeds to demonstrate that the allegations made, even when taken with all their self-evident exaggerations, fail to support the indictment—a task by no means difficult. Portions of the unwholesome matter criticised appear to be introduced with somewhat unnecessary copiousness. The article is redeemed by an extended and well written review of the law of consent in prosecutions for crime as adjudged by the Courts of Great Britain and the United States.

The Creditor's Right to subject the Securities of the Surety when they purport to be for Indemnity merely, by WILLIAM L. SCOTT. Where the creditor seeks to appropriate to his debt the collateral indemnity of the surety, it must appear that the security is for the debt as well as for the ultimate protection of the surety. The creditor has an interest in it, and becomes a *cestui que trust*; and the surety can do no act which will discharge the trust, or release the property from the burden to the prejudice of the creditor. The intent of the transaction by which the indemnity on behalf of the surety is created must be to secure the debt. It is not essential that the intention should be expressed; but it must be found to exist, from a fair interpretation of the instrument and a consideration of surrounding circumstances. The extent of this doctrine is explained. Leading cases in the American Courts are considered.

What is meant by "Private Property in Land" ? by CHRISTOPHER G. TIEDEMAN. The article digests the views of Mr. Herbert Spencer and Mr. Henry George as expressed in their sociological publications, and, after examination, concludes that the reforms which they advocate are unnecessary, inasmuch as the present system of land tenure among English speaking peoples practically fulfils all their conditions and demands.

Separate Cross-bills by Assignees, by CHARLES E. GRINNELL. In insolvency and bankruptcy Courts it occasionally happens that more than one assignee is chosen to hold the debtor's estate, because creditors of different interests and intentions wish to be represented. Such assignees may, under existing systems of practice, sever in defences to

actions, and the purpose of the article is to advocate their right to file separate cross-bills without being required to state why they do not join as plaintiffs. Incidentally, the practice with regard to cross-bills generally, is treated of.

Contracts of Insurance as affected by Changes of Title, by H. CAMPBELL BLACK. The contract is of course made out upon a construction of the actual words employed in the conditions, one general rule being that such conditions shall be construed strictly as against the company, where their operation would work a forfeiture of the policy, and another that the word *alienation* generally requires that the whole interest of the insured, both legal and equitable, should be parted with. The subject is treated under the heads, (i) a mortgage before foreclosure, does not generally avoid the policy; (ii) case of a sale with mortgage back; (iii) assignment as collateral security; (iv) incomplete, as executory contract of sale; (v) bankruptcy or insolvency; (vi) transfer by death of the insured; (vii) transfer of interest between partners. For a fuller treatise upon cases falling under the fourth head, see ante., volume v, page 385.

Ibid.—January-February, 1886.

Codification. Under this head appear a series of articles written by Mr. David Dudley Field, Mr. Edmond Kelly, Mr. Alexander Martin, Mr. Alexander R. Lawton, Mr. C. C. Bonney and Judge Dillon, respectively, in favour of the codification of the existing law, both common and statute. The publication of these articles indicates the interest taken by the profession in the United States in the subject of Codification, a subject which has been more than once ably and fully discussed at meetings of the American Bar Association, and which will be again taken up by that association at its annual meeting this year. It is to be regretted that Mr. Field still continues to charge the profession with an opposition to his well-known views arising solely out of the sordid motive of retaining the general body of the law in sibylline books of which they alone possess the key. However great may be the fault of that conservatism or distrust of innovation which has in all ages characterized lawyers, it is unnecessary and unfair to attribute the hesitancy of the bar, or of a large section of them, to follow in the paths in which he would lead them, to a desire to retain the present system of law in order to coin the perplexities and dangers of suitors into dollars and cents. The articles are instructive and entertaining, and contain the usual arguments (with a few new ones) very forcibly put. Judge Dillon espouses the codification of various branches of law, such as Partnership, Contract, etc., separately—a view already expressed in this journal (ante., vol. iii, at page 143). Mr. Field, on the contrary, desires the work done in a lump.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

ADAMSON v. ADAMSON.

Statute of Limitations—Possession of tenant of owner of life estate as against remainderman.

By a deed to trustees in 1837 two lots of land were conveyed in trust for E. A. for her life, with the remainder as follows :—Lot No. 2 to G. A., and lot No. 1 to A. A., to the use of them their heirs and assigns as joint-tenants and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1862 put her son, the husband of the defendant, into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878, A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2.

Held, affirming the judgment of the Court below, 7 App. R. 592 ; 2 C. L. T. 544, that as there was no time prior to the death of the tenant for life when either the trustees or those entitled in remainder could have interfered with the possession of the lot, the Statute of Limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

Held, also, that for the purposes of the action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination of the joint tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs.

Christopher Robinson, Q.C., for the appellants.

Mowat, Q.C., A.-G., and *James MacLennan, Q.C.*, for the respondents.

FAULDS v. HARPER.

Mortgagor and mortgagee—Sale—Purchase by mortgagee—Right to redeem—Statute of Limitations.

In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee. J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands, and thenceforth dealt with them as the absolute owner thereof. By subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to the defendant L., a *bona fide* purchaser without notice, taking a mortgage for the purchase money. This suit was brought by the heirs of the mortgagor, some eighteen years after the sale and more than five years after some of the heirs had become of age, to redeem the lands.

Held, reversing the judgment of the Court of Appeal, 9 App. R. 537; 4 C. L. T. 203, that the suit being one impeaching a purchase by a trustee for sale, the Statute of Limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. cap. 108, sec. 19.

Held, also, that the plaintiffs were entitled to a lien upon the mortgage given by L. for the unpaid purchase money.

Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to have acquiesced in the possession of the defendants.

McCarthy, Q.C., for the appellants.

Street, Q.C., for the respondents.

PETRIE v. GUELPH LUMBER COMPANY.

Corporation—Promoters—Action against company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment.

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had become embarrassed; that they then concocted a scheme of forming a joint stock company; that the sole object of the proposed company was to relieve the members of

the firm from personal liability for debts incurred in the business and induce the public to advance money to carry on the business; that application was made to the Government of Ontario for a charter, and at the same time a prospectus was issued which was set out in full in the bill; that such prospectus contained the following paragraphs, among others, which the plaintiff alleged to be false:—"1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 143,400 acres, and are estimated to yield 200 million feet of lumber. 2. The interest of the proprietors of the old company in its assets, estimated at about \$140,000 over liabilities, has been transferred to the new company at \$105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company. 3. Preference stock not to exceed \$75,000 will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders *pro rata*. 4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with 8 per cent. per annum, on receiving six months' notice in writing. 5. Even with present low prices the company, owing to its superior facilities, will be able to pay a handsome dividend on the ordinary, as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased."

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus; that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued but before the stock certificates were granted; that the assets of the old company were not worth \$140,000, or any sum, over liabilities, but were worthless: and prayed for a rescission of the contract for taking stock, for re-payment of the amount of such stock, and for damages against the directors and promoters for misrepresentation. There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument three grounds of relief were put forward:—1. Rescission of the contract to subscribe for preference stock. 2. Specific performance of the contract to take back the preference stock during the year 1880 at par. 3. Damages against the directors and promoters for misrepresentation. The company having become insolvent the plaintiffs put their case principally on the third ground.

Held, affirming the judgment of the Court below, 11 App. R. 336, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation.

Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a case of fraudulent misrepresentation as to entitle the plaintiffs to succeed as for deceit.

Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and moreover that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

McCarthy, Q.C., for the appellants.

Christopher Robinson, Q.C., and *Cassels, Q.C.*, for the respondents.

BEATTY v. THE NORTH-WEST TRANSPORTATION CO.

Corporation—Sale by director to company—Ratification of by-law by shareholders—Vote of owner of property.

A director of a joint stock company personally owned a vessel which he wished to sell to the company; he was possessed of a majority of the shares of the company, some of which he assigned to other persons in such numbers as qualified them for the position of directors. Upon a proposed sale and purchase by the company of the vessel, the board of directors, including the owner of the vessel, passed a by-law approving of such purchase by the company, and subsequently, at a general meeting of the shareholders at which the owner and those to whom he had transferred the portions of his stock were present and voted, a resolution was passed confirming the by-law, which resolution was opposed by a number of the shareholders representing nearly one half of the total stock of the company.

Held, reversing the judgment of the Court of Appeal, 11 App. R. 205, that the board of directors had no power to pass the by-law, and under the circumstances the resolution of the shareholders, confirming the by-law, was invalid.

Mowat, Q.C., A. G., and *James MacLennan, Q.C.*, for the appellants.

Robinson, Q.C. and *McDonald, Q.C.* for the respondents.

ONT. & QUE. RAILWAY CO. v. PHILBRICK.

Railway company—Lands taken for railway purposes—Arbitration—Award Matters considered by arbitrators—Costs.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same, which

offer was not accepted, and the matter was referred to arbitration under the Cons. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration; the company, because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

Held, affirming the judgment of the Court of Appeal, Gwynne, J., dissenting, that under the circumstances neither party was entitled to costs.

Geo. Tate Blackstock, for the appellant.

Dr. McMichael, Q.C. for the respondents.

STARRS v. THE COSGRAVE BREWING & MALTING CO.

Surety—Contract of with firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety thereafter.

S. by indenture under seal, became surety to the firm of C. & Sons for goods to be sold to one Q., and agreed to be a continuing surety to the said firm or "to the member or members for the time being, constituting the firm of C. & Sons" for sales to be made by the said firm or "any member or members of the said firm of C. & Sons" to the said Q., so long as they should mutually deal together. P. C., the senior member of the firm, having died, and by his will appointed his sons, the other members of the firm, his executors, the latter entered into a new agreement of co-partnership and continued to carry on the business under the same firm name of C. & Sons, and subsequently transferred all their interests in the business to a joint stock company. An action having been brought against S. for goods sold to Q. after the death of the said P. C.,

Held, reserving the judgment of the Court of Appeal, 11 App. R. 156, and restoring the judgment of the Common Pleas Division, 5 Ont. R. 189, that the death of P. C. dissolved the said firm of C. & Sons, and put an end to the contract of suretyship.

James MacLennan, Q.C. and *O'Gara, Q.C.*, for the Appellant.

Osler, Q.C., for the Respondents.

HOBBS v. NORTHERN ASSURANCE CO.

HOBBS v. GUARDIAN ASSURANCE CO.

Fire insurance—Condition in policy—Loss by explosion—Loss by fire caused by explosion—Exemption from liability.

A policy of insurance against fire contained a condition that "the company will make good loss caused by the explosion of coal gas in a

building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning."

A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured (a hardware shop) the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion.

Held, reversing the judgment of the Court of Appeal, 11 App. R. 741. Taschereau, J., *dubitante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion.

Gibbons, for the Appellants.

Marsh, for the Respondents.

BEATTY v. OILLE.

New trial—Verdict for the plaintiff—Technical breach of contract—Defendant entitled to nominal damages for.

In an action to recover the balance of the contract price for work done for the defendant, the evidence showed that there was a technical breach of the contract, by which, however, the defendant had sustained no substantial damage. A verdict was found for the plaintiff, and a rule for a new trial was refused by the Divisional Court, and this judgment was affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages.

S. H. Blake, Q.C., and *McDonald, Q.C.*, for the Appellants.

Osler, Q.C., and *Cox* for the Respondents.

QUEBEC.]

GRAND TRUNK RAILWAY CO. v. BOULANGER.

Accident—Loss of life at ferry-wharf—Company—Liability of—Damages.

L. B. brought an action for damages against the G. T. R. Co. for the loss of her husband, L. H. F., who was drowned on the night of 6th November, 1883, by falling off the pontoon in the River St. Lawrence at the wharf owned by the Company, in the city of Quebec, when he was going to cross over to Levis, by the Company's ferry between Levis and Quebec, on his way to take the cars at Levis, and alleged that her husband's death had been caused by the default and negligence, resulting from his own imprudence and of the Company's in not having put rails,

guards and gates, and lights sufficient to ensure the safety of passengers. The Company contended that there was sufficient light, and that they were not bound to have guards or gates. At the trial there was evidence that this was a dangerous place, being a dark, narrow passage, leading down to the ferry, that two lights were usually lighted and that only one was lighted on the night of the accident; that after the accident, two were lighted and a chain placed across the end of the passage, so as to prevent persons falling off the pontoon when the ferry was not at its moorings. The Superior Court found that there was sufficient light, and dismissed the plaintiff's action, on the ground that the death of the respondent's husband resulted solely from his own imprudence, negligence and want of care. The Court of Appeal reversed the judgment of the Superior Court and awarded \$1,000 damages to the plaintiff.

Held, that the evidence showed culpable negligence on the part of the Railway Company, in not having sufficient lights and in not having a gate or chain to guard against accidents; that damages should not be increased, but interest should be allowed by the Court of Queen's Bench from the date of the demand.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.]

[10TH FEBRUARY, 1886.

DYMENT v. THOMPSON.

Sale of goods—Place of inspection—Acceptance of part—Cross-action for damages.

The judgment of the Court below, 9 Ont. R. 566; 5 C. L. T. 369, was affirmed.

Lount, Q.C., and *Kappele*, for the appellants.

McCarthy, Q.C., and *Pepler*, for the respondents.

PROUDFOOT, J.]

[25TH FEBRUARY, 1886.]

DORLAND v. JONES.

Religious body—Grant for the benefit of—Change in faith and discipline—Confirmation deed—Right of settlor to add new condition.

The judgment of Proudfoot, J., 7 Ont. R. 17; 4 C. L. T. 195, was reversed.

S. H. Blake, Q.C., and Clute, for the appellants.

MacLennan, Q.C., and Arnoldi, for the respondents.

C. C. RENFREW.]

[10TH FEBRUARY, 1886.]

DAVIS v. CANADIAN PACIFIC RAILWAY CO.

Consolidated Railway Act, 1879—Railway Act, 1868—"Occupied land"—"Proprietor"—Company's duty to fence—Free Grants and Homesteads Act—Neglect to fulfil settlement duties, effect of—Partial answer of jury to written question—Contributory negligence.

The plaintiff and one N. were occupants of adjoining lots of land, the plaintiff residing upon lot 11, and N. being in possession of lot 10, and by agreement between them the plaintiff was permitted by N. to pasture one of plaintiff's horses on N.'s lot. The horse strayed from N.'s lot, which was unfenced, upon the defendant's track, and was killed by a passing train, whereupon the plaintiff sued the defendants for damages.

N. had been located for lot 10 in 1882 by the Crown Land Agent at Pembroke, and his name had been entered upon the agent's book opposite the lot, and upon receipt of the affidavit required by the Act 43 Vict. cap. 4, sec. 1, amending section 7 of the Free Grant and Homestead Act, R. S. O. cap. 24, the agent duly returned him to the Department as being located therefor. No license of occupation was issued, and nothing more was done beyond filing the return in the Department. About twenty acres of N.'s lot were cleared and in pasture, and from a portion hay had been mowed for several seasons. N. had been working on the lot thirteen years, although the settlement duties required by the Act as regards putting up a house, actual residence, etc., had not been fulfilled. It was in evidence that the Department did not usually take advantage of a forfeiture by non-performance of settlement duties, unless another party applied for the lot. No such application was here shewn, but the defendants argued that N. was not an "occupant" in whose interest they were

required to fence. The plaintiff resided on lot 11, adjoining N.'s lot, but he only occupied, without title, a small portion of it, remote from the railway.

At the trial, a question was submitted by the learned Judge to the jury, in the following terms :—" Was Nadeau, mentioned in the evidence, the occupant of lot 10 in Range A. on the 11th August, 1884, or of any part of it ; and did the horse sued for escape from such occupation ?"

And the answer rendered by the jury was : - " We unanimously agree that he is the occupant of the whole lot."

After verdict for the plaintiff, the defendants obtained an order for a new trial, upon the ground that the jury had omitted to answer fully one of the questions submitted to them. It appeared from the evidence that there was ample testimony to prove that the animal escaped from N.'s lot, and could not possibly, owing to a deep rock cutting, have escaped from the plaintiff's lot ; and that there was no conflict of evidence on the point, nor any suggestion by counsel at the trial that the defendants disputed it ; nor was any objection taken at the trial to the form of the answer ; and that all parties had tacitly agreed to dispense with a formal finding. Furthermore, the frame of other questions submitted to the jury, and their answers, assumed the fact. The learned Judge granted an order for a new trial, on the ground that the fact not being formally and distinctly found by the jury, the verdict could not be supported. On appeal to this Court,

Held, that by the words "occupied land," under 46 Vict. cap. 24, is intended to be denoted land adjoining the railway and either actually occupied up to the railway line, or constructively occupied by reason of the actual occupation of some part of the section, lot, or smaller tract by the person who owns it, or is entitled to the possession of the whole ; and that while mere occupation, as that of a squatter, apart from a right to occupy, is not contemplated by the statute, N. was here in a position to require the company to fence.

Held, also, that N., as locatee of the lot, was properly an occupant and proprietor under the statute, notwithstanding his failure to fulfil his settlement duties, as this failure did not *ipso facto* divest him of his interest in the land, in the absence of action by the Crown to dispossess him by cancellation of the location.

Held, also, that a new trial was unnecessary, and that the plaintiff was entitled to his verdict ; and that, under the circumstances, the question of contributory negligence could not properly arise.

Aylesworth, for the appellants.

Hector Cameron, Q.C., and *R. White*, for the respondents.

High Court of Justice.

COMMON PLEAS DIVISION.

[WILSON, C.J.]

REGINA v. CHAYTER.

"Jewellery" within the meaning of 48 Vict. cap. 40, sec. 1—Electro-plated ware.

Held, that electro-plated ware is not jewellery within the meaning of 48 Vict. cap. 40, sec. 1; and a conviction for selling the same without license was therefore quashed, although the fine imposed had been already paid.

Foster, Q.C., for the motion.

WILSON v. LOUCKS.

Pleading—Statement of claim—Sufficiency—Municipal Act—Closing up road.

A statement of claim set out that the plaintiff was the owner of certain land, being part of an original road allowance granted and conveyed to him by the corporation or township; that previous to the execution of the deed by the said corporation, by a by-law which had been duly passed by the municipal council in accordance with, and under the authority of, the Con. Mun. Act, 1883, the said council had authorized the said corporation to sell the parcel of land and to convey the same to the purchaser thereof; that the said by-law was afterwards confirmed by a by-law duly passed by the municipal council in accordance with the provisions of the said Act.

Held, on demurrer, good: that it being alleged that the by-law authorizing the sale was duly passed in accordance with the Act, it must be assumed that all the requirements of the Act had been complied with, and it was not necessary to pick them out and allege performance of each in detail.

Watson, for the plaintiff.

MacLennan, Q.C., for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 6TH MARCH, 1886.]

DAWSON v. MOFFATT.

Creditors' Relief Act, 1880—Execution creditors' stop orders—Priorities—Rateable distribution.

Since the coming into force of the Creditors' Relief Act, 1880, March 25th, 1884, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby, but all must share rateably.

As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in Court as they would have with regard to funds in the Sheriff's hands; and, in any case, when an execution creditor obtains a stop order there will have to be a reference to the Master to ascertain if any other creditors desire to ask a share of the fund.

J. H. Ferguson, for the appeal.

Arnoldi, Shepley, and Ruttan, for other creditors, contra.

[BOYD, C., 31ST MARCH, 1886.]

In re GILCHRIST & ISLAND.

Mortgage—Short Forms Act—Variation of Short Form—Power of sale.

A mortgage purporting to be made according to the Act respecting Short Forms of Mortgages contained a power of sale in the following words:—"The said mortgagee on default of payment for two months may without giving any notice enter on and lease or sell the said lands."

Held, that the provision for dispensing with notice of sale was neither literally nor in substance an exception from nor a qualification of the Short Form within the meaning of the Act; that the words of the power therefore bore their ordinary signification, and that an assignee of the mortgagee, not being named, could not exercise the power of sale.

[APRIL, 1886.]

MUNSIE v. LINDSAY.

Occupation rent—Allowance for improvements—Mode of taking account—Will—Construction—Charge on interest of remainderman after devise of devisee for life—Appeal from Master's report.

In fixing the amount of occupation rent to be paid by a person who had been in occupation of land under mistake of title, and also the amount to be allowed to him in respect of improvements made upon the land, the Master in Ordinary charged occupation rent on the unimproved value and allowed no interest on the value of the improvements.

One of the grounds for the present appeal was because the Master should have estimated the rental on the full improved value.

Held, that apart from the statute R. S. O. cap. 95, sec. 4, when lasting improvements are the subject of compensation, whether in favour of a mortgagee, or a part owner, or a stranger, the rule is to make him account for profits of the whole property improved. The statute, though it limits the lien for improvements to the amount of enhanced value at the date of the action, does not interfere with the manner of accounting as to the occupation rent having regard to the improvements. That remains to be settled so that equitable restitution may as far as possible be awarded on each side. When the possessor makes lasting improvements and thereby increases the occupation rent, and the owner seeks to charge him with this rent, he should do equity by allowing interest on the cost or value, as the case may be, at that time. The claim for the full rent of the improved land, and the counter-claim for interest on the outlay, appear to be reciprocal and entitled to equal respect. Assuming that the outlay is greater than the rental, and that the rental is more than the interest, the strictly correct way to take the account in view of expenditure from time to time, would be thus:—at the end of the first year ascertain the fair rent based on the improved value, and apply this to reduce the actual cost of proper outlay for lasting repairs and improvements, with interest from the date of doing or paying for the work. The balance will represent the amount of principal expended, which is to bear interest for the next year. Add any other expenditure in that year, and so carry on the account to the end. Then, in order to satisfy the statute, ascertain how much principal money has been paid from time to time by the overplus of the rent, and so find how much has been paid in respect of the enhanced value for which a lien is given. If the total of these repayments of principal equals the amount of the enhanced value, the lien has been fully satisfied. If not, there should be a lien for the difference. If, in the aggregate, the lien has been overpaid, yet so long as the cost of improvement has not been fully recouped, it cannot be said that the result is any hardship to the real owner, who need not have invoked this manner of accounting.

By a certain will the testator bequeathed to his wife his farm during her natural life. He then said, "I give and bequeath to my son Adam

his board and lodging, with £5 per year during his natural life, to be given as hereinafter mentioned. I give and bequeath to my son Alexander" (certain other land) "under the following restrictions, * * to pay to Adam £3 currency each and every year during Adam's natural life. I give and bequeath to my son Robert" (the said farm) "after his mother's death on the following conditions, that is to say: £2 in each and every year to be paid by him to Adam my son, and to keep him (my son Adam) in board and lodging during his natural life."

Held, affirming the decision of the Master in Ordinary, that the will meant that Robert was to supply maintenance continuously after the testator's death as a condition of enjoying the land, and not only after the death of his mother, and such maintenance formed a charge upon the land left to Robert.

It is not, as a general thing, the best rule in cases of varying opinion as to value, to reject one set of witnesses *in toto*, and to adopt the figures of an opposite set. One should rather conclude that neither is exactly to be followed, and that the truth lies somewhere between the extremes.

Cassels, Q.C., and *R. Cassels*, for the appellants.

Moss, Q.C., and *W. Barwick*, contra.

[PROUDFOOT, J., 26TH FEBRUARY, 1886.]

In re BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

Winding up company—Insolvency, evidence of—45 Vict. cap. 23 (D)—Pleading acknowledgment of insolvency.

Application was made by the executor of a policy holder in the company for a winding up order. The policy was by its terms payable in three calendar months next after satisfactory proofs of death should have been received at the office of the company. The policy holder died on 15th April, 1885. On 29th April the proofs were furnished with a request for payment. Payment was never made.

Held, that the policy was not due at the time of the request made, and the demand of payment was therefore insufficient to support an application to wind up the company.

The applicant offered the following evidence as to insolvency:—The suspension of the company was announced in the press; the annual report for 1884 showed that the company was doing no new business, but spoke hopefully of the future, and stated that it would be able to pay a bonus, but that its position was uncertain until after the valuation of assets to be made; on 29th January, 1886, application was made to the general manager at Montreal for payment, who said that owing to instructions from the head office he was unable to make any payment; at an interview with the general manager and the company's solicitor, at

which the winding up Acts were discussed, the general manager said that up to that time he had only been advised of the company's position by cable; and as a result of the meeting the general manager agreed that if it became necessary to wind up the company, it should be wound up in Ontario.

Held, insufficient to establish insolvency, or as an acknowledgment of insolvency.

Semble, that the general manager had no implied power to make arrangements for winding up, his duties being to manage the company as a going concern.

Held, that if a petitioner intends to rely upon an acknowledgment of insolvency he should aver it in the petition.

Osler, Q.C., and Moss, Q.C., for the petitioner.

James Maclellan, Q.C., and Francis, for the company.

[7TH APRIL, 1886.]

HUTTON v. WANZER.

Covenant for indemnity—Costs of action on indemnity.

W. sold land to H. and covenanted to indemnify him against a mortgage thereon.

Held, that H. was not entitled to solicitor and client, but only to party and party, costs against W. of an action on the covenant, although he was entitled in the action to recover his solicitor and client costs of defending an action brought by the mortgagee.

Hoyles, for the plaintiff.

W. H. P. Clement, for the defendant.

IN CHAMBERS.

[WILSON, C. J., 29TH APRIL, 1886.]

In re FOLEY v. MORAN.

Division Court—Jurisdiction—Setting aside judgment—Trial—Rule 270.

The Judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial.

Although the defendant has fourteen days to move against a verdict in the Division Court, it is proper for the plaintiff to enter judgment and issue execution before the expiry of the fourteen days.

The practice under Rule 270 is not applicable to Division Courts.

Kappele, for the plaintiff.

A. D. Kean, for the defendant.

[BOYD, C., 12TH JANUARY, 1886.]

MACPHERSON v. TISDALE.

Attaching debts—Unascertained costs—Set-off—Payment into Court.

By the judgment in this action the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment certain creditors of the plaintiff issued attaching process from a Division Court, attaching all debts due from the defendant to the plaintiff. After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid \$115 into the Division Court, having previously paid another sum of \$115 to the sheriff to procure his release from arrest under a *capias* after judgment in this action.

Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the attaching process, and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into Court, as it was by his own default; and therefore the money paid into Court pursuant to the attaching process was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff.

W. H. P. Clement, for the plaintiff.

A. H. Marsh, for the defendant.

[24TH MARCH, 1886.]

CANADIAN PACIFIC RAILWAY COMPANY v. CONMEE.

Fraud—Production of documents—Privilege—Particulars—Facts.

In an action to recover payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent, the defendants sought (i) production of documents showing the results of measurements and surveys made by the plaintiffs for the purpose of litigation, and (ii) particulars of the matters alleged to be wrong in each certificate complained of.

Held, that the documents in question were privileged even if they were procured not for this action but for another action between the same parties; but

Held, that the plaintiffs should give particulars of the errors in the certificates on which they relied; and although this might involve the disclosure of matters of fact derived from privileged communications, yet it was no breach of the rule which protects documents so privileged.

Information obtained by means of the measurements and examination of the company's surveyors is not *per se* privileged; the results are matters of fact relating to the quantities and proportion of earth and rock, excavation and filling.

R. M. Wells, for the plaintiffs.

Wallace Nesbitt, for the defendants.

[3RD APRIL, 1886.]

*In re PARR.**Infants—Bequest—Foreign guardian.*

An application for an order sanctioning the payment of a bequest in favour of certain infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into Court.

Re Andrews, 5 C. L. T. 516, distinguished.

Hoyles, for the application.

[THE MASTER IN CHAMBERS, 23RD MARCH, 1886.]

REGINA *ex rel.* FELITZ v. HOWLAND.

Municipal election—Quo warranto—Master in Chambers—Jurisdiction—Time—Qualification on wife's property—Municipal Act, 1883.

The jurisdiction of the Master to grant a *fiat* for a summons in the nature of a writ of *quo warranto* to contest the validity of a municipal election is established by the 13th section of the Administration of Justice Act, 1885.

A summons issued within a month of the formal acceptance of office by the statutory declaration of qualification and office held is in time, notwithstanding that it was issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declaration.

The respondent was rated on the assessment roll in respect of a leasehold property sufficient in value to qualify him for office; but the property was that of his wife, to whom he was married in 1872, and who acquired the property in 1884.

Held, that the respondent had no estate in the property in respect of which he was rated, and therefore did not possess the qualification required by section 73 of the Municipal Act of 1883.

Bain, Q.C., and *Kappelle*, for the relator.

Robinson, Q.C., *Lash, Q.C.*, and *Henry O'Brien*, for the respondent.

[MASTER IN CHAMBERS, 24TH MARCH, 1886.]

JENNINGS v. GRAND TRUNK RAILWAY COMPANY.

Not guilty by statute—Particulars.

Particulars were ordered of any defence intended to be set up by a plea of not guilty by statute, other than a denial of the facts stated or implied in the statement of claim and a denial of the legal liability of the defendants to the plaintiff.

Shepley, for the plaintiff.

Aylesworth, for the defendants.

[12TH APRIL, 1886.]

CARNEGIE v. COX.

Examination before trial—Witnesses—Discovery—Rule 285.

The defendants set up as a counter-claim a claim against the plaintiff which they had bought from the assignee for creditors of F. & L., stock-brokers, who were not parties to the action. This claim was for the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. & L. had dealt improperly with his stock; but that he had no means of discovering what they did with it, unless by examining them.

Under these circumstances an order was made under Rule 285 for the examination of F. & L. for discovery only.

J. R. Roaf, for the plaintiff.

H. Cassels, for the defendants.

[27TH APRIL, 1886.]

PRITTIE v. LINDNER.

Serving papers—Toronto agent—Disclosing principal.

Service of papers on the Toronto agent of country solicitors is not good unless accompanied by a statement of the name of the solicitor for whom the agents are served.

MacGregor, for the plaintiff.

Holman, for the defendants.

[29TH APRIL, 1886.]

In re RAINEY LAKE LUMBER CO.*Security for costs—Action on behalf of others—Financial incompetency of plaintiff.*

S., a contributory of the Company, who was petitioning to set aside a winding-up order, was ordered to give security for the costs of the Company and a creditor opposing his petition, where it appeared that S., although nominally interested as the holder of stock on which nothing had been paid was financially incompetent, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified S. as to costs.

J. R. Roaf, for the Company.

Worrell, for the petitioning creditor.

J. B. Clarke, for S.

In the Maritime Court.

(Reported by R. Gregory Cox, Esquire, Barrister-at-law.)

THE JEROME.

Collusive sale to defeat maritime lien—Sale as a defence to proceedings to realize the lien in a foreign court—Abusing process of the court—Judgment in rem—Maritime lien.

The schooner V. was in tow of the tug *Jerome*, and through the fault of the latter collided with another vessel, and was sunk. To defeat the maritime lien for damage for which proceedings had been taken in a foreign Court, the owner of the tug allowed the engineer's wages to run in arrear, and then procured a petition to be filed in the Court, and the schooner to be sold to a nominal purchaser.

Held, that the proceedings were an abuse of the process of this Court and should be set aside.

Held, also, that petition was the proper mode of proceeding.

On the 20th September, 1881, the schooner *Victor* (owned by the petitioner) was being towed by the steam-tug *Jerome* down the Detroit river, and through the fault of the tug the schooner collided with another vessel and was sunk.

On the 2nd September, 1882, the petitioner instituted proceedings in admiralty in the District Court for the Eastern District of the State of Michigan, against the *Jerome*, to recover damages for the sinking of his schooner, and the tug was arrested and released on bail.

At the time of the injury complained of one Misener was the owner of the tug, but in answer to the petitioner's libel, one Johnstone filed a defence setting up that the tug was a duly registered Canadian vessel, and on the 9th August, 1883, a petition had been filed in the Maritime Court of Ontario, at Sarnia, on behalf of her engineer, claiming \$100 wages to be due him; that no answer had been filed, and that a decree had been pronounced for the claim, under which the tug had been sold and purchased in the name of said Johnstone.

This sale being binding on the District Court, as a judgment *in rem*, and the petitioner's claim being in other respects established, an opportunity was given to impeach the judgment and other proceedings of the Maritime Court at Sarnia in that Court.

A Petition was accordingly filed in this cause in the Maritime Court at Sarnia, in October, 1885, alleging the facts aforesaid, and that Misener, in June, 1883, had sold the tug to one Gurd, subject to the petitioner's claim, and that the proceedings in this Court were designed and continued for the purpose of defeating the petitioner's claim by means of a pretended sale.

Gurd was examined at Sarnia pursuant to Letters Rogatory issued by the District Court, and an order of the High Court of Justice made by the Master in Chambers, and he admitted that he had purchased the tug from Misener in June, 1883; that the wages of the engineer were allowed

to run in arrear for the express purpose of bringing about a sale, in order to defeat the petitioner's claim for which the tug had been libelled at Detroit; after the necessary amount of wages had accumulated, proceedings were instituted in this Court. The tug was never arrested. The sale was held by the Deputy-Marshall under the decree of the Court, but was only a pretended sale, no one but Gurd and his friends bidding. Johnston's name was used, but Gurd was the real purchaser. Johnstone knew nothing of the matter until some time afterwards. He never had or claimed to have any interest in the tug. Gurd ran her both before and after the sale as his own property.

The petition was heard before the Surrogate Judge at Sarnia on 14th November, 1885.

Parkes for the petitioner. Petition is the proper proceeding in a case of this kind; *Ricker v. Ricker*, 27 Gr.; 7 App. R. 284. The Court having jurisdiction, its judgment cannot be questioned in a foreign tribunal, and therefore the application is properly made to this Court: 2 Smith L. C. 773; *Pigott* on Foreign Judgments, 243-6. The judgment being *in rem*, the petitioner has a right to impeach it on the ground that a fraud has been practised on the Court: *Pigott*, 246: *Casrtrique v. Imrie*, L. R. 4 H. L. 414.

The petitioner's maritime lien for the damage occasioned by the collision gives him a right to make this application: *Waples* on Maritime Liens, 88, 560, 771. Collusion and abuse of the process of the Court are the grounds of the application; *White v. Lord*, 13 C. P. 202; *Girdlestone v. Aquarium Co.*, L. R. 3 Ex. Div. 142; *Bonsteil v. McMaster*, 6 O. S. 33; *Balfour v. Ellison*, 3 P. R. 30; *Glass v. Cameron*, 9 Ont. R. 712; *Shaw v. Nickerson*, 7 U. C. R. 541: *Ochsenbein v. Papelier*, L. R. 8 Ch. 695.

Lister, for the Respondent.

The Court held that the application was properly made, and that, it being proved that the process of the Court had been abused, and was being used as an engine of fraud, the decree and all proceedings there under should be set aside.

[Order accordingly.]

THE CANADIAN LAW TIMES.

VOL. VI.

JUNE, 1886.

No. 8.

DISTRESS CLAUSES IN MORTGAGES.

THERE *must be a real rent and not a fictitious one designed simply as a protection against creditors.*—The question has arisen in several cases in England as to the validity of such clauses when their effect is to operate as a fraud upon the Bankrupt Act. There may be some doubt as to the full extent of the application of these cases to the condition of things in this Province where we have no Insolvent or Bankrupt Act. The general effect of these cases, however, is that such clauses in order to be effectual must create a real tenancy at a real rent, and that the form of an attornment clause cannot be effectually adopted where the object of the parties is to create a fictitious tenancy at a fictitious rent which is never intended to be collected *qua* rent, and is never intended to be collected at all under the provisions of the clause, except in a case where the mortgagor shall become bankrupt, and the mortgagee shall thus be brought into conflict with another creditor. The terms of the clause itself and the amount of the rent reserved afford a test of the validity of the transaction, and if upon a consideration of these it is made manifest that the tenancy is merely a fictitious or illusory one, the clause will be ineffectual. For these reasons it is submitted that the principle underlying the English cases is applicable to the condition of things in this Province; for although the judgments therein usually refer in terms to the Bankrupt

Act, yet the decisions are based upon the determination of the question whether the tenancy created by the attornment clause is a real or an illusory one.

In *Ex parte Williams* (a) the attornment clause in the mortgage in question reserved a rent which was about seven times the actual letting value of the mortgage property, and was more than five times the amount required to pay the interest upon the principal secured by the mortgage. The mortgagee moreover entered into a covenant with the mortgagor, that if the interest was punctually paid as it become due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagee should not have become bankrupt or have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of mortgaged property, and should not have ceased to carry on his business therein, then the mortgagee would not for a period of five years require payment of the principal. Lord Justice James in delivering judgment says: "It appears to me that the attornment clause was a mere sham, a mere contrivance and device to give the mortgagee an additional benefit in the event of the mortgagor's bankruptcy."

In *Re Stockton Iron Furnace Co.* (b) a mortgage was given to Bankers to secure to them the floating balance of one of their customers, not to exceed at any time £50,000. An attornment clause in the mortgage provided for the payment of £5,000 per year to the mortgagees by way of rental. Nothing was paid by way of rent under this clause during the first two years of the existence of the mortgage, when the mortgagees being about to go into liquidation, the mortgagees distrained for £10,000 in full of the two years rental due under the attornment clause. There was some conflict of testimony as to the actual letting value of the mortgaged property, five witnesses swearing that £5,000 per annum was a fair rental and four witnesses swearing that the letting value was not more than half that sum.

(a) 7 Chy. D. 138.

(b) 10 Chy. Div. 335.

Jessel, M. R., (c) said, "I am by no means satisfied that the rent was in fact excessive, and certainly it is not shown to me to be so excessive as to prove that there was any intention on the part of the two parties to this mortgage that it should not be a real rent but a fictitious rent."

In the same case Bramwell, L. J., says (d): "Then with reference to the case of *Ex parte Williams* (e), I think it very likely, indeed I have no doubt, that the parties here did not contemplate that the £5,000 a year would be paid if things went on prosperously and fortunately. In all probability nothing would have been paid except the interest. But they did not intend that it should never be paid. There was no agreement between the parties inconsistent with the arrangement expressed in this deed, although there was an understanding upon the part of both parties that it would not go just into operation while the affairs of the company went on prosperously. To my mind the difference between this case and *Ex parte Williams* is this, that in *Ex parte Williams* it was found, and if I may add my concurrence to that case it was rightly found, that the intention and object of the arrangement there was to commit what was called a fraud upon the bankruptcy law, by entering into stipulations which were not to be enforced except in the event of bankruptcy. Here although no doubt the parties did not contemplate the mortgagees putting their right to the rent in operation, yet if there had been no liquidation, the bankers would have made the distress which they have made, if for any other reason they had thought that their balance was ill-secured."

In the same case Jessel, M. R., says (f): "There may be a rent so large that the reservation of it must be pronounced a sham;" and James, L. J., says: "You must show that it was rent which both parties knew to be outrageous."

In *Ex parte Jackson* (g) the attornment clause reserved a

(c) At p. 354.

(e) 7 Chy. Div. 138.

(g) 14 Chy. Div. 725.

(d) At p. 358.

(f) At p. 352.

rent which was more than 57 times the letting value of the mortgaged property occupied by the mortgagor.

Baggallay, L. J., says (*h*) : “ If a rent of seven times the real value as in *Ex parte Williams* was so excessive as to lead the Court to consider it absurd, what shall we say when in the present case the reserved rent is more than fifty times as much as the real value ! It appears to me that the case comes clearly within the principle of *Ex parte Williams*, and that we cannot regard the attornment clause as having been introduced for the proper purpose of such a clause, viz., to create a reasonable tenancy between landlord and tenant, but that the object was to enable the mortgagees to put their hands upon chattels of considerable value, apparently far in excess of the annual value of the premises, whenever in the exigencies of the case it should be desirable for them to do so.

Cotton, L. J., in the same case (*i*) says : “ If the attornment clause is one which really constitutes the relation of landlord and tenant between the mortgagor and mortgagee, the Court will not be nice in considering whether the rent is too great for the mortgaged property. But it is a very different question which we have now to consider, viz., whether there is a real or only a fictitious or ostensible contract to constitute the relation of landlord and tenant. On that question the amount of rent created may be most material ; it may be so excessive as to afford, even of itself, a probability that that which is in form a contract constituting the relation of landlord and tenant, and reserving a return for the use of the property, was not so in substance and fact, but was a mere colour in order to cover something else. Nor is it material how the rent, if it be rent, is to be applied. No doubt the rent may be sufficient to cover the interest, but if it is more than sufficient to cover the interest and is received by the mortgagee, he must apply it in reduction of the capital, subject to the question whether the interest was in arrear at the time when he took possession ; when the interest is not in arrear an account

(*h*) At p. 737.

(*i*) At p. 739.

would not be taken with annual rents. Therefore the stipulation that a rent fairly reserved, a real rent, is to be applied in paying the principal and interest of the mortgage debt cannot avoid a contract which in other respects is a real contract, and not a mere device to cover something else."

Speaking of the amount which may be reserved by way of rental, Baggallay, L. J., in the same case says (*j*): "Now so far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived by the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent, such as an ordinary tenant would be willing to give for the property, under ordinary circumstances. That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bona fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that, though you may call it rent, it is no longer a real rent, but a fictitious payment under the name of rent."

Thesiger, L. J., upon the same point in the same case says (*k*): "It appears to me absolutely clear, both upon principle and authority, that attornment clauses will be valid and operative, although the rent reserved by them may be considerably in excess of what may be required to keep down the interest in the mortgage debt. I can even imagine a case in which the rent reserved may be sufficient to pay both principal and interest."

The same learned Judge then proceeds to say: "If from the terms of the particular deed, or from the amount of the rent fixed by the attornment clause, it can be concluded by the Court that the rent is not a real rent but a mere sham,

(*j*) At p. 734.

(*k*) At p. 743.

and that the attornment clause is a mere device to give the mortgagee a hold, in event of bankruptcy, over the goods and chattels of the mortgagor, which would otherwise have been distributed amongst his general creditors, then the attornment clause is invalid and inoperative, because it is a fraud upon the bankruptcy law."

Ex parte Voisey, Re Knight (l) was a case where the mortgagor borrowed from a building society, and gave a mortgage with provision for monthly payment of a fixed sum which would in time satisfy both principal and interest, and containing an agreement to pay certain fines in event of his making default in payment of monthly instalments, and further containing an attornment clause by which he agreed to pay as rent the amount of the said monthly instalments together with such fines as might be imposed under the said agreement.

Jessel, M.R., in this case says (m): "If it never was intended by the parties to create the relation of landlord and tenant, though they used words having that effect, it may be that the relation was not created in law. The evidence upon which the Court came to the conclusion in *Ex parte Williams* and *Ex parte Jackson* was the absurdity of the amount of the rent reserved having regard to the real annual value of the mortgaged property. In *Ex parte Williams* a rent of £20,000 a year was reserved for a property which was not worth more than 3,000 a year, and the Court came to the conclusion that that was not a genuine rent, or a rent which either party ever intended to be paid, or that the mortgagor should be held to that rent, but that which they did intend was that in case of the bankruptcy of the mortgagor, the mortgagee should be enabled to distrain so as to get a preference over the other creditors. In *Ex parte Jackson* the rent was not seven times the annual value of the property, but fifty-seven times as much, and the Court came to the same conclusion. They did not believe that either party ever intended that a

(l) 21 Chy. Div. 442.

(m) At p. 453.

rent of fifty-seven times the value of the property should be paid."

Brett, L.J., in the same case (n) says: "Now in what sense can it be said that it is not *bona fide*? Whatever may be its terms and however excessive the rent, it is not a fraud as between two parties, because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual. It cannot be therefore in the ordinary sense of the term be a fraud at all. The only way in which it can cease to be a *bona fide* contract is, if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws, that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bona fides* with regard to the bankruptcy laws must exist if at all at the moment when the contract is made. Therefore what we have to consider is this (and this is the real meaning of *Ex parte Williams*), at the time when the contract was made was it made for the purpose of being acted upon whether there is a bankruptcy or not; were their minds really then fixed upon this, that it was to be acted upon only if there should be a bankruptcy? In other words they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case of his bankruptcy. That seems to me to be the true proposition and the true principle of law which is laid down in *Ex parte Williams*."

The same learned Judge in the same case then proceeds to say (o): "But *Ex parte Williams* and *Ex parte Jackson* shew that where the rent reserved or that which is called rent, is so abnormal that you can gather from it alone that the parties must have known and intended that it should not be paid as a rent, that it never could be paid as a rent,

(n) At p. 459.

(o) P. 460.

or distrained for as a rent (for there never could in ordinary contemplation be anything for which such an absurd amount could be realized), when you find such a state of facts you infer from it (there being nothing to countervail it) that the parties never intended that the stipulation should be acted upon as fixing a rent to be paid by the one or to be distrained for by the other, that it was not a stipulation as to rent at all, but was merely a fiction, and that what was intended was only that in case of the bankruptcy of the mortgagor the mortgagee should have the right to seize upon the goods which were then on the premises, not to seize on them if there were no bankruptcy, but only to seize upon them in case of bankruptcy. It seems to me that that is the true meaning of *Ex parte Williams* because in the *Stockton Case* Lord Justice James who had been a party to deciding *Ex parte Williams* seeing that words had then been used which might not properly and truly express the principle, that a "fair rent" had been spoken of, changes his proposition, and says that the inference is to be drawn, not from what you might call a fair or an unfair rent, but from the rent being of such an absurd amount as to shew that an evasion of the bankruptcy laws was intended."

Brett, L.J., in *Ex p. Voisey (p)* says: "I have already said that *Ex parte Williams* and the other cases, though decided on the ground that the amount of the rent reserved was absurd, do not exclude other means of showing a want of *bona fides*. For instance, suppose that the amount named as the rent was extremely moderate, but it was proved that there was a secret arrangement that no demand should be made for the rent, and no distress should be levied for it except in case of the bankruptcy of the mortgagor, that arrangement would equally show that the supposed tenancy was only a device to avoid a fair distribution of the property of the property of the mortgagor in bankruptcy. I take it that the question is whether there was a real honest stipulation between the parties, intended

to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defrauding the bankruptcy law."

In the same case (*q*) Cotton, L.J., states the principle governing this question in these words: "We must consider what the principle of these cases really is, and I understand it to be this. It is understood that a mortgagee may enter into a contract with the mortgagor that the mortgagor shall be the tenant to the mortgagee, and it is equally understood that the law gives certain rights and priorities to a landlord; but the question is whether the contract between the parties was one under which (whatever were the words used) they really intended to create the relation of landlord and tenant, or whether under the mask of certain words they intended, without any real tenancy, to endeavour to give to the mortgagee all those rights which he could have only if he was landlord and the mortgagor was his tenant. This may be put in other words. It may be said the question is whether there was between the parties any real creation of the relation of landlord and tenant, or whether, whatever were the words used, it was all a sham. In considering that question we must look at both the amount of the rent, or what is called the rent, and the other circumstances, and if we find that the so called rent is so excessive that it never could have been meant to be paid by the occupier to the owner of the land for its use and occupation, that is very strong evidence indeed that there was no real intention to create a tenancy; and if you find that the amount of the so called rent is so large that the very moment one payment was made the relation of landlord and tenant, if it ever existed, must determine, that is almost conclusive against there being any real intention to create the relation of landlord and tenant."

It appears from the same case (*r*) that it is not objectionable for the attornment clause to contain a condition that it shall become effective upon the mortgagee becoming

(*q*) P. 462.

(*r*) P. 455.

entitled to enter into possession under the terms of the mortgage, and for the possessory clause to give the mortgagee the right of entry, not only upon default being made in payment of principal and interest, but also upon the mortgagor becoming a bankrupt.

The rent may fluctuate but must be certain.—A rent, before it can be distained for, must be fixed and certain; but this does not mean that it must be unchangeable or that it may not fluctuate. *Id certum est quod certum reddi potest.* It is always certain where it is capable of being ascertained or reduced to a certainty. Thus in *Daniels v. Gracie* (s) where the rent reserved on a demise of a marl pit and brick mine was 8d. per yard for all the marl got out of the pit, and 1s. 8d. per M for all the bricks made out of the mine, the rent was held to be sufficiently certain to support a distress.

So also the rent was held to be sufficiently ascertained where the mortgagees were a building society and the rent reserved was a monthly instalment of a fixed amount together with a fine of five per cent. per month on the total amount in arrear and unpaid at the time of each monthly meeting of the society and such other moneys as might be payable under the rules of the society (t).

In the same case it is said (u): "Now it is true that if that which is agreed upon as the payment is uncertain, it is not a rent. It must be certain. But the rent is certain if by calculation and upon the happening of certain events it becomes certain, and as my lord has already said, the mere fact of rent being fluctuating does not make it uncertain. If a lease be made for ten or twenty years, at a rent increasing every two or three years, then the rent fluctuates no doubt, but it is not uncertain. It becomes certain as each year advances. And so in other cases. If the rent of a farm for one year, if you please in advance, is to be so much if a certain number of acres are ploughed up; then in the next year a different rent if so many acres are

(s) 6 Q. B. 145.

(t) *Ex p. Voisey*, 21 Chy. Div. 442.

(u) At p. 458.

left in pasture or in crops; then the rent is fluctuating, but it becomes certain the moment the condition is fulfilled, and therefore although a fluctuating it is a certain rent. If in the present case the agreement had been this, that in case of the non-payment of the instalments by the mortgagor the rent should be the damage which the other party might suffer, so that it would have to be ascertained at large or by a tribunal, that would be a stipulation for an uncertain payment which could not be rent and then there would be no lease. But here it seems to me that upon the happening of the condition named the rent fixes itself and is therefore a certain rent."

The nature of the tenancy created.—The precise nature of the tenancy created between a mortgagor and mortgagee by virtue of the possessory clauses usually contained in mortgages has been the subject of much discussion, and has given rise to numerous conflicting decisions which are all collected and commented upon in the note to *Keech v. Hall* in Smith's Leading Cases.

We will refer merely to a couple of the most recent authorities touching the nature of the tenancy created by attornment clauses. In *Re Threlfall (v)* the mortgage deed there in question contained an attornment clause whereby the mortgagor attorned and became tenant from year to year at a yearly rental payable in equal quarterly instalments, and it was thereby agreed that it should be lawful for the mortgagee at any time after three months from the date of the mortgage, without giving previous notice of his intention so to do, to enter upon and take possession of the premises whereof A. had attorned tenant and to determine the tenancy created by the said attornment clause. It was contended on appeal to the Court of Appeal by Mr. Joshua Williams, the well known real property lawyer, that the tenancy created by the attornment clause being determinable at the will of the mortgagee was not a yearly tenancy but a tenancy at will, because, as he contended, if one party had the power to determine the tenancy the other

necessarily had the same power; and in support of this proposition he cited *Co. Lit.* (55 a), *Doe v. Thomas* (w), and *Morton v. Woods* (x).

James, L.J., in giving judgment (y) says: "We are asked in this case not to construe a deed but to contradict it for the purpose of entirely destroying the intention of the parties to it. The mortgagor was left in possession of the property and was thereby enabled to give a power of distress to the mortgagee. The attornment clause was in the common form and was intended to create the relation of landlord and tenant between the parties. The mortgagor by the express terms of the deed was to be tenant from year to year at the yearly rent specified. This tenancy was determinable at the will of the mortgagee; but this power the mortgagee would equally have had if the premises were in the possession of a third party and it is the usual power given to a mortgagee to enable him to take possession. We are asked to say that in spite of the express terms of the deed this was not a yearly tenancy but a tenancy at will, on account of some expressions of some of the judges in *Morton v. Woods*. But in that case there was no actual demise, but for the purpose of giving effect to the manifest intention of the parties it was held that a tenancy at will had been created. The appeal must be dismissed."

In the same case, Cotton, L.J., says (z): "We are asked to say that the tenancy, stated in this attornment clause to be a yearly tenancy, was in fact a tenancy at will. The ground on which we are asked to say this, is, that power was given to the mortgagee to determine the relation of landlord and tenant. But I know of no law or principle to prevent two persons agreeing that a yearly tenancy may be determined on whatever notice they like. There is freedom of contract in this respect. In one sense indeed there is a tenancy at the will of the landlord; that is, he is enabled to put an end to a yearly tenancy at a very short notice. All that the passage cited from *Coke* means, is,

(w) 6 Ex. 854.

(y) 16 Chy. Div. 281.

(x) L. R. 3 Q. B. 658; 4 Q. B. 293.

(z) At p. 281.

that if there is a demise with no term fixed between the parties except the will of the lessor, then it is implied by law to be also at the will of the tenant."

In *Ex parte Voisey* (a), the attornment clause provided that the tenancy thereby created should be a tenancy from month to month, but it was contended before the Court of Appeal that it was at most a tenancy at will by virtue of the first and second sections of the Statute of Frauds which, in so far as concerns the question now under discussion, enact, that all leases, estates or terms of years, or any uncertain interest of or in any lands made or created by parol and not put in writing and *signed by the parties so making or creating the same*, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates only at will, *except all leases not exceeding the term of three years* from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds parts at the least of the full improved value of the thing demised.

Brett, L.J., in delivering judgment (b), says: "Now the stipulation which is called an attornment, if it be a *bona fide* and an honest transaction, is a contract in writing between the two parties to it. It is signed by only one of them if you please, but it is delivered by that person to the other, and kept by him, and the intention of it is that it shall form a contract, and if that be so it is a contract. If it is a contract, it is a contract in writing, and if it be a *bona fide* contract and is in writing, the effect of it depends entirely upon the construction of the writing. Now upon that construction it was argued that, if any tenancy is created, it is only a tenancy at will, and that that tenancy at will was put an end to by the bankruptcy, and consequently that some of these distresses were invalid. It was argued as I understand it, that it must be considered as a tenancy at will, because it seemed to be a tenancy for more than three years, and was therefore void by the Statute of Frauds, because there is no agreement in writing signed

(a) 21 Chy. Div. 442.

(b) At p. 457.

by the landlord, and that then the result is, that if a tenancy for more than three years is attempted to be made, it becomes by the Statute of Frauds a tenancy at will. It is a sufficient answer to say that this is not the case of a tenancy within the Statute of Frauds at all. The first section of the Statute of Frauds applies only where the tenancy, if good, *must of necessity last for more than three years*. But if, at the time of the arrangement, the tenancy may last for less than three years, although it may last for more, it is not within that section at all. And it is obvious that the tenancy in this case, although it may last for more than three years, may last for less."

Application of proceeds of distress.—In the absence of express provision to the contrary, the fruits of the mortgagee's distress under an attornment clause are applicable in payment of the principal as well as the interest of the mortgage debt, or of the principal alone if no interest be due. The fact that the yearly rent reserved by the attornment clause is equal in amount to the yearly interest of the mortgage debt as provided by the deed, and is made payable on the same days is not of itself sufficient to displace the *prima facie* right of the mortgagee to apply the proceeds of the distress in satisfaction of principal as well as interest (c).

Liability of the mortgagee to account.—Various *dicta* of eminent judges of the Court of Appeal occur in the reported cases, showing the opinions of these Judges to be that the effect of the ordinary form of attornment clause is to make the mortgagee a mortgagee in possession from the time of the execution of the mortgage, and thus to render him liable not only for the rents and profits actually received by him under the clause in question, but also for those which but for his wilful default he might have received. It is worthy of note, however, that the only reported case in which the question has arisen for judicial determination came before a Court of first instance, and the learned Judge, after considering all of the said *dicta*, refused to be

(c) *Ex parte Harrison*, 18 Chy. D. 127.

governed by them and held that the mortgage was not thereby rendered a mortgagee in possession.

In *Re Stockton Iron Furnace Co.* (d), James, L.J., puts the query: "Would not a subsequent incumbrancer be entitled to treat a first mortgagee under a clause of this nature as a mortgagee in possession as to the rent thereby reserved, and charge him with it as rent which but for his wilful neglect or default he might have received?" In answer to this query, Jessel, M.R., says: "Probably the fear of this is the reason why the rent generally is made only equal to the interest."

In the same case, James, L.J., delivering judgment (e), in speaking of the position of the mortgagees who had obtained an attornment clause securing a rental of £5,000 a year, says: "They were mortgagees in possession liable to account in respect of this £5,000 a year, as against any second mortgagee or incumbrancer, for what they had received or but for their wilful default might have received.

* * * * * They were incurring liabilities as mortgagees in possession and they have a limited right as landlords." And in the same case, Bramwell, L.J., speaking of the effect of the attornment clause in question (f), says: "One of the consequences would be this—to give a second mortgagee a right to charge them with the rent they might have received."

In *Ex parte Punnett* (g), Jessel, M.R., says: "The mortgagee becomes mortgagee in possession and liable to account as such."

In *Ex parte Harrison* (h), Lord Selborne, L.C., says: "As between himself and a subsequent mortgagee, the mortgagee would be treated as in possession of the property. You could not say he was in that position as regards the mortgagor."

A somewhat similar question arose before Chancellor Boyd in *Court v. Holland* (i), where he says: "As between

(d) 10 Chy. Div. at 353.

(f) At p. 357.

(h) 18 Chy. Div. at 135.

(e) Pp. 356, 357.

(g) 16 Chy. D. at 235.

(i) 29 Gr. at p. 23.

mortgagor and mortgagee there is no hard and fast rule which prevents the mortgagee from taking possession of the premises mortgaged at a fair and reasonable rent fixed by agreement between them. In such a case this will ordinarily be the measure of liability because the mortgagee is then in possession, not technically as a mortgagee in possession by virtue of his mortgage title, but as under the special agreement (*j*). Other considerations obtain, however, when *at the time of such an arrangement* there is a subsequent mortgagee of the premises who has not assented to the dealing between the first mortgagee and the mortgagor. This subsequent incumbrancer is not bound by the transaction, and can claim to have such a rent charged as would be a proper occupation rent chargeable against a mortgagee in possession. The reason for the distinction is plain; the mortgagor cannot make any arrangement for the *quantum* of rent which would derogate from the right of the subsequent incumbrancer to reduce the prior security by the amount of a fair occupation rent" (*k*).

In *Ex parte Jackson* (*l*) Vice-Chancellor Bacon sitting as chief Judge in Bankruptcy says: "Attornment clauses have been very long in use in mortgage deeds. The first, and perhaps the most important, motive which induces mortgagees to take them is this—they avoid the inconvenience which attends their going into possession as mortgagees, whereby the mortgagee becomes liable for all that he might have received but for his wilful neglect or default."

The only reported case in which the question has squarely arisen for decision came before the same learned judge who said that he would not be the first judge to decide that a mortgagee whose mortgage deed contained an attornment clause was thereby placed in the position of mortgagee in possession, and liable to account on that footing. On the contrary, he was of opinion that the attornment clause

(*j*) *Murray v. O'Dea*, 1 B. & B. at 117.

(*k*) *Gregg v. Arnott*, Ll. & G. temp. Sug. 246.

(*l*) 14 Chy. Div. at 729.

was merely an additional security for the mortgagee, as much for the payment of principal as for the payment of interest. A mortgagee was not obliged to avail himself of this clause, and there was no pretence for saying that because the mortgage deed contained an attornment clause under which possession had not been taken, the mortgagee was thereby fixed with all the liabilities of mortgagee in possession. The expressions referred to were merely *dicta*, and were not really in point (*m*).

A. H. MARSH.

TORONTO.

(*To be concluded.*)

(*m*) *Stanley v. Grundy*, 22 Chy. Div. 478.

EDITORIAL REVIEW.

The Short Forme Act.

The decision in *Re Gilchrist and Island*, ante p. 255, is one that affects many titles in this Province. It is a common, we might say almost universal, idea, carried extensively into practice, that the short form might be treated as it was done in this case without affecting its validity under the Act. It may not be the best opinion, and we believe that some conveyancers have always adhered to the opinion expressed by the Chancellor in *Gilchrist's* case; but it is, as we say, a most common one.

If the decisions heretofore had been hard and fast that *any* departure from the short form was fatal, the present one would have been in keeping with them. But in *Lee v. Lorsch*, 37 U. C. R. 262, a slight departure was made from the strictness which was supposed to be required in using the forms, by holding that the substitution of the word "re-entering" for the word "re-entry" did not materially alter the short form, and therefore did not remove it from the operation of the statute. This decision has been criticised by Mr. Leith, Q.C., who cautions great care in the use of the forms, and advises a strict adherence to their language; Leith R. P. Stat. 108. It seems to be objectionable on principle, because it is an evident departure from the given formula to which is assigned by the statute a particular meaning which the words themselves do not bear. If the departure be permitted as to one word, it would be unobjectionable in every word, as long as the meaning was not materially altered. Now the meaning of the words in the formula has nothing to do with the principle or operation of the statute. The formula might be a perfect jargon of words, incapable of grammatical construction, and without any meaning in themselves; or it might be a mere symbol. And yet the meaning assigned to it by the Act would be the meaning to be attributed to it when used in a conveyance. An alteration

of a symbol or unmeaning formula of words would take it out of the statute. Then why should not there be a similar result upon the alteration of a formula of words which happen to have a signification of their own, but are entirely unmeaning when compared with that which is assigned to them by the statute? It is the apparent intention of the statute that the mere language used in the short forms shall have the meaning of the long forms. The deed may be made in the form prescribed by the Act, or it may be made "in pursuance of the Act," or it may refer thereto—the intention being that the Act should apply if the parties in any way refer to the Act to show that they intend to take its benefit. But change of language was not contemplated by the Act except in a very limited degree; for in schedule B it is provided that the feminine gender may be substituted for the masculine, and the plural number for the singular.

If it were necessary to provide for that change of language without which the forms could not be used, does not that evidence an intention that there should be a stringent adherence to the mere language of the forms in other respects? It seems to be a clear departure from the intention of the Act that words used in the forms should be interchangeable with their synonyms. And yet we have the decision in *Lee v. Lorsch*, which determines in effect that the symbolic language of the short forms may be changed as long as *their* meaning is not altered.

Turning now to *Gilchrist's* case, we have a decision that you cannot wholly dispense with a term, or condition, or stipulation contained in the long form, though you do no violence to the language of the short form. Schedule B enacts that the "parties may introduce into or annex to any of the forms in the first column any express exceptions from or other express qualifications thereof respectively." Now assuming that our premises are correct, and there is high authority for it, the exceptions or qualifications are not to be made in respect of the language of the short forms, but in the terms, provisoes, or stipulations of the deed. The Legislature might well say, if you desire to stipulate or

agree according to the terms set out in the long forms of our Acts, you may do so by using a shorter form of words which we provide for you. But if those terms and stipulations do not suit your case, you may make exceptions or qualifications by introducing into or annexing to the short forms apt words to explain your meaning, and the corresponding changes shall be considered to be made in the long forms. There is no express declaration that if you desire to have the benefit of the Act you must agree to all the stipulations contained in the long forms in some shape or other. This would narrow the range of the Acts considerably, and make them useful only when the parties are content to take each clause in the long form and adopt its terms in some shape or other as part of their agreement, without omitting any one of them. The extension of this doctrine may produce results not anticipated.

For instance, if the proviso for payment in a mortgage be that the mortgage shall be "void on payment of (amount of principal money) of lawful money of Canada and taxes and performance of statute labour," the proviso will not be within the Act, because one of the terms of the long form provides for payment of interest; and according to *Gilchrist's* case you cannot omit any term of the long form. And yet many mortgages supposed to be within the Act are used to secure repayment of principal alone.

By the decisions in *Lee v. Lorsh*, and *Re Gilchrist and Island*, we have arrived at this illogical conclusion, that you may vary the language of the short forms but you cannot vary the terms of the bargain by omitting one of them. It would be better had we followed in the steps of the English conveyancers, and avoided these Acts as dangerous pit-falls.

A Question for Grand Juries.

During the Spring Assizes just past, a great many addresses have been made to grand juries; and a great many subjects have been placed before them, upon which they have been asked their opinions—not a little, we fancy, to their astonishment. A juryman might well be surprised

to be asked by a Judge what he thought of the relations of capital and labour, having been brought up to believe that Judges are very great and very learned men, part of whose business it is to instruct juries, and not to learn from them.

But there is one question which is full of moment to the public, the jury, the profession, and all concerned in the administration of justice, which is well within the ability of grand juries to answer, and yet it is never put to them. That question is this—Is business well done when the Judge sits from nine o'clock in the morning until midnight, or two or three o'clock in the following morning, without cessation, keeping in constant attendance jury, suitors, witnesses and counsel. A very decided answer would be given to this. Complaints have appeared from time to time in the public press, and the Bar have openly talked about it in unmistakable tones of dissatisfaction.

It used to be given as an excuse that it saved a great deal of expense to the public and the suitors in attendance. The public saved the fees of jurors, and the suitors saved the fees of witnesses. Both are now satisfied to bear a little more expense in order to have causes well tried. No suitor likes to have his case commenced in the evening when a full day's work has already been done by judge and jury, and every one is tired and sleepy. Every man has the right to the use of the full and clear faculties of both Bench and Bar; and it is certain that a case is not as well tried, when those engaged in it are either jaded with work or wearied with waiting, as when all are fresh and more capable of work.

We repeat that this is a matter well within the capacity of grand juries to deal with, and one that they probably would express an opinion upon. The Judges were made for the assizes, not the assizes for the Judges.

Strikes and Contempt of Court,

A curious case has arisen in the United States and is referred to in the *Central Law Journal*, 30th April, 1886. The Texas and Pacific Railroad is in the hands of receivers

appointed by the Circuit Court of the United States. The employees were amongst those who engaged in the railway strike. Several of them were arrested, charged with obstructing the operation of the road, and brought before the Judge of the Circuit Court, who committed them to prison for contempt of court. The learned Judge is reported to have said: "If any employee of the receivers has any grievance or complaint as to his employment, or wages, or treatment, he can bring the matter before the Court, and the Court will hear and arbitrate, and see justice done in the premises. It is well settled law that whoever unlawfully interferes with property in the possession of a Court is guilty of contempt of that Court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the Court in the full and complete possession and management of property in the custody of the Court is guilty of a contempt of Court, and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation and threats. The employees of the receivers, although *pro hac vice* officers of the Court, may quit their employment as can employees of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently; where they combine and conspire to quit with or without notice, with the object and intent of crippling the property or its operation, I have no doubt that they thereby commit a contempt, and all those who combine and conspire with employees to thus quit, or as officials of labour organizations issue pretended orders to quit, or to strike, with an intent to embarrass the Court in administering the property, render themselves liable for contempt of Court."

A Critic's Critic.

There is no journal which devotes more space or more care to reviews of books and pamphlets, and none which is read with more attention to this department, than the *Law Quarterly Review*. The eminence of the editor at first

called attention to this *Review*, and the work sustains his reputation. We might add that the works on Contracts and Partnership—the latter a neat specimen of codification—are (or were, until lately), very generally considered to be classics in English law. But we now learn that they are the works of a “flippant and ignorant scribbler.” One who has tried his hand at codifying, can hardly be deemed to be so hostile to codes that his unfavourable criticisms must be the result of want of thought, prejudice, or sheer ignorance. One would naturally suppose them to be most valuable. They are certainly rather severe upon the Code of Evidence lately introduced into the Legislature of the State of New York, and not unwarranted. (See L. Q. Rev., April, p. 256.) We have the Editor’s declaration, if that were necessary, that he is not opposed to codification, in the same number of the *Review* (p. 134). And yet the *Albany Law Journal* speaks of the reviewer (who we suppose is the Editor, as the review of the code is not signed), as “an anonymous, flippant, and ignorant scribbler.” The difference between the two journals is this, that the one is a believer in codification, the other in a code.

If the code is a good one it can be defended on its own merits. If the criticisms are unsound they can be answered. But if the criticisms are met with vituperation only, one is apt to suspect that there is something in them, and nothing in the code. “No defence—abuse the plaintiff’s attorney.”

Dalhousie Law School.

We have received the Calendar for 1886-87. It contains copies of the examination papers for 1886. We notice that in the paper on Constitutional Law the fifth question is, “State what was decided in the Privy Council in *Russell v. The Queen*, and *Hodge v. The Queen*. How do you reconcile these decisions?” There are ten other questions on the paper, and the time allowed for answers is three hours. We are not so sure that the second part of the fifth question

can be answered ; or if it can, that it can be done in three hours, or even three months. Nevertheless, we should like to hear from the able Professor Weldon on this point.

A Grain of Truth.

In a recent law examination a student referred to the application of certain rules by the Court of Chancery as the "doctoring of Equity."

Sir Wm. Meredith.

The Hon. Wm. Meredith, late Chief Justice of Quebec, has been created a Knight Bachelor.

BOOK REVIEWS.

The Mutual Rights and Duties of the Bench and Bar. By S. A. McCLUNG.

The Evils of Case Law. By GEORGE H. CHRISTY.

The Origin and Utility of Case Law. By HARVEY HENDERSON.

Courts of Review. By DAVID F. PATTERSON.

These pamphlets are addresses delivered by the several gentlemen whose names appear as authors before Allegheny County Bar Association, 1886, and published by the association.

The essay on the Rights and Duties of the Bench and Bar contains many things that we are apt to regard as truisms, but which in actual practice we find totally disregarded.

The evils of case law are not lessened by the multiplication of reports. The learned essayist deploras the departure from principle in a search after the particular instances to be found in the reported cases. The enormous amount of reporting aggravates the evil. Text writing degenerates on the same account, the old books being superseded by compilations of head notes.

English Constitutional History from the Teutonic Conquest to the present time. By THOMAS PITT TASWELL-LANGMEAD, B.C.L., Oxon. Third edition, revised throughout, with notes and appendices. By C. H. E. Carmichael, M.A., Oxon. London: Stevens & Haynes, 1886.

This book has become a standard work for universities, and is to be found on most of the curricula in the Faculties of Law. This edition has come from good hands, Mr. Carmichael having been associated with the late Mr. Langmead for some time in editing *The Law Magazine and Review*. The book is so well known that little need be said of it. Some additional notes will render it more interesting to students.

REVIEW OF EXCHANGES.

American Law Register.—November, 1885.

The Power of an Administrator with the Will annexed over his Testator's Real Estate, by JAMES H. BROWN. The learned writer treats principally of the construction and operation of statutes which in various States of the Union grant powers to and impose duties upon administrators with the will annexed, with regard to the real estate of the testator. The Common Law upon the subject down to the time of the passage of the statute 21 Henry VIII, cap. 4, is given; then the effect of that and subsequent Acts. American cases cited.

Ibid.—January, 1886.

Citizenship, by THOMAS P. STONEY. A contribution upon the true meaning of the fourteenth amendment to the constitution of the United States. Two general propositions are laid down: (i) children born in the United States of alien parents are citizens of the United States. (ii) Children born abroad of American parents are aliens.

Birth alone will not constitute citizenship. To entitle to citizenship, under the fourteenth amendment, the child must not only be a native, but he must also have been at the time of his birth "subject to the jurisdiction of the United States." When is a person subject to the Jurisdiction of the United States? If the first general proposition above given, is true, what is the necessity, and what is the meaning of these added words? These words, according to the learned writer, refer to the children of Embassadors, of foreign invaders or prisoners of war, or children born on foreign vessels in national ports or harbours. All or some of these may be said to be not subject to the jurisdiction. Other constructions which have been put upon the words (as in the *Slaughterhouse Cases*, 16 Wall. 73) are referred to and combatted or distinguished. The article concludes:—"In view of the danger to be feared from a participation in our government, at no distant day, by the children of Chinese parents, and in view of the omission to provide for the children of our own people born abroad, our constitution ought to be amended, and that without delay."

Ibid.—February, 1886.

Legislation impairing the Obligation of Contracts, by H. CAMPBELL BLACK. The constitution of the United States prohibits the several States from passing any law impairing the obligation of contracts. The constitution and application of this provision are explained.

Criminal Law Magazine.—July, 1885.

Pardon and Amneety, by W. W. THORNTON. The subject is discussed at considerable length. Who may pardon, when, and in what manner, the effect of the pardon, and cognate questions, are fully treated.

Ibid.—September, 1885.

Proving an Alibi, by W. F. ELLIOTT. An *alibi* need not be specially pleaded, but may be set up under the general issue, or plea of not guilty. It has been held that the evidence of it must outweigh the evidence of the prosecution, but the position best supported is that it is sufficient if it raises a reasonable doubt of the guilt of the accused. Particularity as to time, place and identity are, of course, of the highest importance where this defence is raised. The character of the witnesses must also be well enquired into, and they should be subjected to the most minute and rigid cross-examination. Failure of an attempt to prove an alibi, while it may be taken into consideration, is not necessarily proof of guilt, and it is error to instruct the jury that it must have great weight against the prisoner—it should have no greater weight against the prisoner than failure to prove any other defence.

Measurement of Blood Corpuscles, by MARSHALL D. EWELL. Dr. Ewell gives the results of his experiments made with a view of determining whether there is a constant average size of the human red blood-corpuscles such as to render it possible to distinguish, by means of micrometric measurements, human blood from the blood of domestic animals. A table of results of the measurements is appended. The conclusions reached are, shortly, that when a sufficient number of corpuscles are measured, there appears to be an average size which varies within very narrow limits, which may possibly be accounted for by personal or instrumental errors; that, granting that it is possible to identify blood by the measurement of the red corpuscles (of which the learned writer is not fully satisfied), it is reckless in the last degree, if not criminal, to express an opinion upon the measurement of less than 100 corpuscles; and that, by a selection of the corpuscles, a dishonest observer might increase or lessen the average unfairly, and without possibility of detection. Publication at an early day of the results of continued investigation is promised.

Ibid.—November, 1885.

Profert of the Person in Criminal Cases, by M. W. HOPKINS. No person can be compelled, in any criminal case, to be a witness against himself. The article discusses the unsettled question whether or not Courts can compel one accused of crime to make profert of his person; and, if so, would this in effect be compelling an accused to give evidence against himself. The cases in favour of compelling such profert, and those opposed, are first collected separately, and an interesting discussion of them gone into; the conclusion reached is adverse to the power of the Court to compel profert.

Competency as Witnesses of Attorneys, Judges, Jurors and Prosecutors, by STEWART RAPALJE. As a general rule, none of the persons named is, on grounds of propriety, in the face of objection, a competent witness. Exceptions are noted and explained.

Ibid.—January, 1886.

Habeas Corpus in controversies touching the custody of children, by SEYMOUR D. THOMPSON. The rights of the father, adoptive father, widowed mother and guardian, in respect to the custody of children, are explained, together with what conduct will impair or forfeit these rights. The scope of the remedy by habeas corpus is very fully treated of. Remarks follow upon the case of apprentices, questions touching the religious education of children, and cognate matters.

Ibid.—February, 1886.

Liquor Laws, by W. L. MURFREE, Sr. The subject is discussed from the standpoint of American constitutional law.

Conviction of one Crime under indictment for another, by W. F. ELLIOTT. "The following is submitted as a fair, if not an entirely satisfactory statement of the law upon the subject: where a Court has general jurisdiction over both misdemeanours and felonies, one may be convicted therein, under an indictment for one crime, of any crime proved by the evidence, provided it is included in the crime charged and embraced within the terms of the indictment; and this is true, although the crime charged should be a felony and the one proved but a misdemeanour, except in those states or jurisdictions where the doctrine of merger is in force."

Ibid.—March, 1886.

Proving Criminal Intent, by W. F. ELLIOTT. Except in cases where the law presumes a criminal intent from the very act itself, and in other cases involving certain statutory crimes, intention is a question of fact, to be proved as any other fact, although it is not always necessary to prove a specific intent to do the particular act. This is generally done by showing the surrounding and attending facts and circumstances. Where the party himself may give evidence, it may also be done by that evidence. Evidence is also admissible of acts of the accused not contemporaneous with the crime, but so connected with it as to cast light on the intention. So, also, of declarations and threats made by the accused. Evidence of drunkenness is often admissible on the question of intent. Where the accused is a competent witness, and the intent is material, he may testify directly with regard to it.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Boyd, C.]

[20TH APRIL, 1886.

THE VICKERS EXPRESS CO. v. CANADIAN PACIFIC R. CO.

Consolidated Railway Act, 1879—Express Companies—Reasonableness of rates—Facilities—Preference.

The judgment of the Court below, 9 O. R. 251 ; 5 C. L. T. 322, was affirmed.

Robinson, Q.C., McCarthy, Q.C., and A. R. Creelman, for the appellants.

Moss, Q.C., Cassels, Q.C., and Blackstock, for the respondents.

REGINA v. ST. CATHARINES M. & L. CO.

Constitutional law—Indians—Title to the soil.

The judgment of the Court below, 10 O. R. 196 ; 5 C. L. T. 323, was affirmed.

McCarthy, Q.C., A. R. Creelman, and W. P. R. Creelman, for the appellants.

Mowat, Q.C., A. G. Cassels, Q.C., and D. Mills, for the respondents.

ROSE, J.]

WALDIE v. BURLINGTON.

Order amending plan by closing street—R. S. O. cap. 111, sec. 84—By-law declaring street open—Municipal Institutions Act, R. S. O. cap. 174, sec. 506—Quashing by-law.

The judgment of Rose, J., 7 Ont. R. 192; 5 C. L. T. 31, was affirmed. Lash, Q.C., and Carscallen, for the appellants
Osler, Q.C., and Laidlaw, for the respondent.

C. C. HURON,]

MCLEAN v. TAYLOR.

Sale of chattels—Failure to deliver—Measure of damages.

The plaintiff claimed that the defendant had contracted to sell him seven head of cattle for \$260, and had failed to deliver them, and he sued for damages for breach of contract. The learned Judge of the County Court of the County of Huron, before whom the action was tried without a jury, gave judgment in favour of the plaintiff and assessed the damages at the sum of \$150.

It appeared in evidence that the plaintiff was in the habit of purchasing cattle in Ontario to sell again in the Buffalo market, and the defendant was told that the cattle in question were wanted on a particular day named, so as to be shipped; but it was not proved that the defendant knew or was told that they were intended for the Buffalo market or were required to complete a shipment. The plaintiff required these cattle to make up a car-load, or twenty-six head, and he claimed that, not getting the defendant's cattle, he could not ship any, as it was necessary that the car should be filled to prevent the cattle hooking one another; but he admitted subsequently that this could be obviated by fencing the cattle off in the cars. The plaintiff swore that, after defendant's failure to deliver, he could not buy cattle suitable for his purpose, although it was not shown that none could be purchased; but that, had he secured defendant's cattle, his profit on the sale of the car-load in Buffalo would have been \$150 to \$175.

Held, that it was improper to assess the damages on the basis of the loss on the entire car-load, as this could not reasonably be supposed to have been in contemplation of the parties when they made the contract; and that, at the most, the damages should be limited to the loss upon the seven not delivered.

Held, further. that inasmuch as the evidence showed that the plaintiff could have purchased cattle to complete his car-load (though at a higher price) the profit on the resale in the Buffalo market was not the true test of the measure of damages; but the latter should be fixed by the difference between the contract price and the price at which other cattle could be then bought; the judgment was therefore upon computation reduced to \$55, with Division Court costs to the plaintiff of the action, and no costs of appeal.

Garrow, for the appellant.

, for the respondent.

High Court of Justice.

CHANCERY DIVISION.

[BOYD, C., 20TH JANUARY, 1886.]

In re TRENT VALLEY CANAL. *In re* WATER STREET
AND "THE ROAD TO THE WHARF."

*Public Works—Expropriation—Compensation—Ownership of roads—Soil
vested in Crown—Parties.*

Certain lands, on which were two roads called "Water street" and "The Road to the Wharf," being required for public works were expropriated by the Government of Canada, and the compensation therefor was claimed by the corporation of the village in which the roads were situate and by one R. C. S., through or over whose lands the roads ran.

It appeared that roads were established as a public highway by the municipal authorities by by-laws in the years 1842 and 1845 respectively, under 4 & 5 Vict. cap. 10, secs. 39 and 51, although no compensation was paid to the owners therefor.

Held, that although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user), since the year 1858, at all events, it became vested in the Crown by virtue of 22 Vict. cap. 99, sec. 301, and that the Attorney-General of Ontario should be added as a party to give protection to the Dominion in expropriating the land.

[5TH MAY, 1886.]

The Attorney-General of Ontario having been added as a party, the matter was reargued, when it was

Held, that the soil of the roads was vested in the Crown represented by the Attorney-General of Ontario, and to him as a public officer the compensation is payable; even if there was jurisdiction, the discretion of the Attorney-General, or rather that of the Lieutenant-Governor in Council, as to the ultimate disposition of the fund should not be interfered with.

When the highway is no longer needed for public use, the infallible justice of the Crown will regard the rights of all interested.

McCarthy, Q.C., and *Barron*, for R. C. Smith.

Irving, Q.C., for the Government of Ontario.

G. T. Blackstock, for the Corporation of Fenelon Falls.

Nelson, for the Government of Canada.

McMichael, Q.C., for a mortgagee.

[5TH MAY, 1886.]

DOBBIN v. DOBBIN.

Dower—Husband and wife—Equitable dower—Equity of redemption.

The plaintiff claimed dower against the heir-at-law of the intestate, who created a mortgage on the lands prior to his marriage, which mortgage was still unsatisfied. He died possessed of no other property.

Held, that, the mortgage being paramount to the wife's dower which attached only upon the equity of redemption, she could not claim to have the heir's estate operated with the payment of this mortgage in order to give her the full measure of her dower at law; and if she sought more than dower on the value of the estate, after deducting the amount of the mortgage, she must contribute rateably to the payment of that encumbrance; that this was to be worked out in this way: getting one-third of the rents and profits for life she may keep down the one-third of the interest attributable to the mortgage debt for the like period. The yearly value of her dower was to be ascertained by deducting from one-third of the rents, issues and profits of the whole estate one-third of the yearly interest of the mortgage, and on that basis the value of an annuity to produce that sum during her life must be computed according to the methods usually employed in fixing a gross sum for dower.

Poussette, Q.C., for the plaintiff.

Dumble, for the defendant.

BOYER v. GAFFIELD.

Fraudulent conveyance—Lapse of time—Statute of Limitations.

This was an action brought by a judgment creditor having unsatisfied writs in the hands of the sheriff, seeking to set aside a certain voluntary deed of conveyance made by the judgment debtor in September, 1873, of certain lands and premises, alleging that the judgment debtor was then largely in debt, and that the plaintiff's debt was then still unpaid. The defendants, the grantees under the voluntary conveyance, set up that even if the plaintiffs ever had any right to resort to the lands for the recovery of the debt, such right had been extinguished and lost by the delay.

Held, that inasmuch as the plaintiff's debt was shewn to have existed prior to the deed of conveyance impeached, which conveyance was of an entirely voluntary character, the plaintiff was entitled to the relief claimed; for a deed which is by the statute of Elizabeth fraudulent as to creditors is not validated because it has not been attacked for ten or twenty years. It is a fraudulent deed, and it remains so to the end of time, though it may be not effectively impeachable because of purchasers for value without notice having intervened, or because the claims of all creditors have been barred or extinguished by lapse of years, neither of which elements obtained in the present case.

Hoyles and Riddell, for the plaintiffs.

Cassels, Q.C., and *J. W. Kerr*, for the defendant.

[13TH MAY, 1886.]

WALLIS v. SCHOOL TRUSTEES, SEC. 9, LOBO.

New school section—Selection of school site—Change of same—Requisition under 48 Vict. cap. 49, sec. 64—Costs.

A new rural school section having been formed, it became necessary for the three trustees to provide a school site, &c. A public meeting of the ratepayers was called pursuant to 48 Vict. cap. 49, sec. 64, which nearly all the ratepayers attended when the T. L. site was chosen by a majority vote of both the ratepayers and trustees as against the J. C. site.

A complaint against this result was lodged with the school inspector under sec. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site at which meeting a unanimous vote was had in favour of a third site called the C. site.

In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal and to restrain building on the C. site, in which it appeared in evidence that 50 out of the 67 ratepayers approved of the latter site, it was

Held, that the necessary precaution under sec. 64 of the statute of taking the opinion of the ratepayers was complied with, and the selection made was the T. L. site; that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose: and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change this site with the consent of the necessary majority.

The whole tendency of recent amendment of the education acts has been to give the rural school sections greater powers of self-regulation and self-government; and the Courts should not be astute to interfere unless there has been a plain violation of the statute, or a manifest usurpation of jurisdiction, or a reckless interference with individual rights.

The action was therefore dismissed but without costs, as it was a new point and the statute was not plainly expressed.

Hellmuth, for the plaintiffs.

T. Meredith, for the defendants.

[GALT, J., 16TH MAY, 1886.]

CAREY v. GOSS.

Trade mark—Infringement—Injunction—Registration of Trade Mark—Registration of assignment—Trade Marks and Designs Act of 1879—42 Vict. cap. 22, secs. 4 & 14 (D).

The L. F. P. P. Co. published a newspaper called "The Commercial Traveller & Mercantile Journal," which would be known as "The Commercial Traveller," as those words were printed in much larger letters than the words "and Mercantile Journal," and registered it under the Trade Marks & Designs Act, 1879, as "The Commercial Traveller's Journal." The company sold the paper and good will to the plaintiff, and on the negotiations for the sale, the plaintiff saw the defendant, who was then employed by the company as manager and editor, and who showed him the assets of the paper, the printing contracts, etc., and recommended the purchase as a good investment.

After the sale the defendant, who had retained a mail list of the subscribers to the paper, published a new paper called "The Traveller," and used the list to send copies of his paper to some of the names contained therein. It was shown in evidence that while the defendant was in the

employ of the company he often used the word "Traveller" as designating the paper then known as "The Commercial Traveller." In an action to restrain the defendant from infringing the plaintiff's trade mark, It was

Held, that the title of the paper published by the defendant was an infringement of the Trade Mark of the plaintiff, and that the subsequent publication by the defendant of a paper under the name of "The Traveller" was calculated to mislead persons and induce them to believe the plaintiff's paper was the paper referred to.

Held, also, that although the 4th section of the Trade Marks & Designs Act of 1879, 42 Vict. cap. 22 (D.) requires registration of the trade mark before the proprietor can bring an action, and the 14th section provides for registration of an assignment, still the latter section does not enact that registration shall be necessary to give effect to such assignment; an injunction was therefore granted.

Foy, Q.C., for the plaintiff.

Morson, for the defendant.

[PROUDFOOT, J.. 6TH MARCH, 1886.]

In re MELVILLE.

Sale subject to a condition—Breach of condition—Will—Devise—Possibility—R. S. O. cap. 106, sec. 2—Right of entry for condition broken—Valid condition of re-entry—Heir-at-law—Devisees.

On 26th September, 1844, J. Le B. by deed bargained and sold, etc., to the Municipal Council of D. District, in consideration of five shillings, a certain lot for the purpose of erecting thereon a schoolhouse for the use of D. District; to have and to hold the same for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a schoolhouse for the use of the said district, or if the said council should at any time erect any other building save said schoolhouse and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council.

J. Le B. by his will dated 23rd July, 1847, devised all his real estate to his nieces, and died in the year 1848, without having revoked or altered his will. The municipal council complied with the condition by building a schoolhouse, and at the time of the making of the will the condition had not been broken, but the successors of D. District dealt with the land otherwise than was authorized by the deed and broke the condition.

The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law, were entitled to the proceeds thereof.

Held, that the word "possibility" in R. S. O. cap. 109, sec. 2 included a right of entry for condition broken, mentioned in section 10, and is more extensive than that phrase, and might therefore be the subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired so as to require words applicable to after acquired estates to be found in the will.

The possibility of reverter was a contingent interest that existed in the testator when the will was made; the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession.

Held, also, that a condition of re-entry or condition strictly so called, as distinguished from a conditional limitation, is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room. The condition in this case was perfectly valid. The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it.

W. H. Miller, Q.C., for the petitioners the devisees.

Rae, for the heirs-at-law.

MacLennan, Q.C., for the infants.

[20TH APRIL, 1886.]

COOK v. NOBLE.

Will, construction of—Maintenance to widow and family—Abatement of legacies.

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate with a direction to convert his personal estate into money, pay debts and invest balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain and educate her family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money and to take therefrom enough to maintain her family and herself. And he directed his sons to pay her \$150 a year after they received their lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay \$1,000 to each of the daughters as they attained 21, and if there was not sufficient personal estate to pay them, the balance was to be a charge on the real estate. The real estate was to be divided between the sons when

the eldest attained 25, and then the trustees were to give him \$2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his \$2,000.

Held, that the children were only entitled to maintenance until they attained their majorities.

Held, also, that the widow was entitled to maintenance until the provision as to the \$150 came into operation, which would be when the sons respectively attained 25. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained 25, the intermediate rents not being disposed of, descended to the heirs at law, i.e., the children, and might be applied for their maintenance if the personal estate was insufficient.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support when given in general terms, will cease with the marriage or forisfiliation of a child. *Knapp v. Noyes*, Amb. 861; *Gardiner v. Barber*, 18 Jur. 508, and *Wilkins v. Jodrell*, 13 Ch. D. 564, considered and commented on.

A widow ceases to be entitled to support and maintenance upon marrying again.

Query, as to her rights if she should again become a widow without means of support.

Held, if the \$2,000 legacy to the son absolved all the personal estate the daughters should get none of it as their legacies were charged on the land, and that the \$2,000 legacy and the legacy for maintenance must abate proportionately.

Moss, Q.C., and *McPhillips*, for the plaintiffs.

MacLennan, Q.C., for the infant defendants.

Cassels, Q.C., and *Holland*, for the adult defendants.

[28TH APRIL, 1886.]

REGINA *ex rel.* FELITZ v. HOWLAND.

In re O'BRIEN.

Contempt of Court—Publication of letter by solicitor pending appeal—Time at which offence to be considered—Right of relator to make the motion—Apology—Costs.

A judgment was delivered by the Master in Chambers on a *quo warranto* proceeding on 23rd March, 1886, and an article referring to it was published in "The Mail" newspaper on the next day. On 26th March, O'B.

who was the solicitor for the defendant gave notice of appeal against the judgment, and on the same day wrote a letter in answer to the article commenting on the conduct of the Master in reference to the case, which letter was published in "The Mail" on the next day. On a motion made by F. the relator to commit O'B. for contempt, notice of which was given on the same day as notice of the abandonment of the appeal. It was

Held, that the nature of the charge against O'B. must be determined as at the time of the publication of the letter, and could not be affected by the fact of the abandonment of the appeal on the same day that the notice for the motion to commit was given; that O'B. could not take advantage of his double character of citizen and solicitor, that it is not allowable for a solicitor engaged in a cause to comment in the press on it while pending; that the relator in the *quo warranto* proceeding had a right to make the application; that the letter was not an injudicious but an improper one and was a contempt of Court.

An affidavit was put in and read on the argument containing an apology by O'B. which was coupled with statements by his counsel as to the character, ability and conscientiousness of the Master, and a denial of any intention to impugn any of these.

Held, that as the appeal had been abandoned and no prejudice could now arise to the applicant, a proper disposition of the case would be to refuse the motion upon payment of the costs by O'B. the solicitor.

Bain, Q.C., for the motion.

S. H. Blake, Q.C., contra.

[FERGUSON, J., 16TH APRIL, 1886.]

HIGGINS v. LAW.

Guardian of infants—Right to receive infants legacies.

This was an action brought by certain legatees against the executors of the will under which they claimed, claiming the amount of their legacies. It appeared that the will devised the real and personal estate to the plaintiffs and certain other parties share and share alike: that the executors had collected the estate, converted it into money, and invested the proceeds on mortgage security, and had paid the other legatees their legacies on their attaining their respective majorities; but as to the plaintiffs' legacies, they being infants, the defendants had paid their legacies over to their guardian duly appointed by the Surrogate Court. The guardian afterwards absconded with the amount of the legacies, and the plaintiffs brought this action accordingly.

Held, that the defendants by their dealings with the estate had put themselves in the position of trustees as to the moneys, and they were wrong in paying it over to the guardian, and judgment must go for the plaintiffs, with costs.

Guthrie, Q.C., and Watt, for the plaintiffs.

Bain, Q.C. and Scanlon, for the defendants.

IN CHAMBERS.

[BOYD, C., 3RD MARCH, 1886.]

In re MORPHY.

Administration order—Judgment, entry of—Execution creditor of legatee—Receiver—Mistake—Action.

A summary order was made for the administration of the personal estate of M. deceased. The order was not entered as a judgment, as it should have been by Rule 485, owing to a mistake of an officer of the Court. The London & Canadian Loan & Agency Co., who were execution creditors of one of the legatees and devisees of M. obtained an order appointing the Company receiver of the share of the execution debtor, and served notice of this receivership upon the executors of M., but received no formal notice of the proceedings under the administration order. The Company, however, were informed of the proceedings and upon an *ex parte* motion procured the administration order to be properly entered as a judgment and then applied for the carriage of the proceedings under it.

Held, that the status of the Company was not that of assignee of the legatee but only of a chargee or lienholder upon the fund or property to which the legatee was entitled, and therefore the Company would not have been entitled in the first instance to ask *in invitum* for a summary order to administer; and the slip which was made in not having the order to administer properly entered did not give them any additional right in that respect; but notice of the proceedings should have been given to the Company in order that they might be bound by what was done.

A receiver appointed as the Company were here, has a right to assert his claims actively, though he may require in some instances the sanction of the Court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the Company to assert their claim by an action.

Arnoldi, for the Company.

Moss, Q.C., and C. Miller, contra.

[3rd MAY, 1886.]

McCAW v. PONTON.

Appeal—Setting down—Dies non—Objection.

An appeal from an order made by a local master on Saturday the 17th April, in an action in the Chancery Division was set down to be heard on Monday the 26th April, which was Easter Monday, and a *dies non*. The appeal was put upon the paper for the following Monday.

Held, that the practice followed was a convenient one and an objection to it was overruled.

Held, also, that the proper mode of taking such an objection was by motion to strike the appeal out of the list.

Neville, for the appellant.

E. Douglas Armour, for the respondent.

[5TH MAY, 1886.]

GOULD v. BEATTIE.

Slander—Particulars—Examination.

An order for particulars, under the statement of claim in an action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars.

Fullerton, for the plaintiff.

Allan Cassels, for the defendant.

THOMPSON v. FAIRBAIRN.

Executors—Compensation—Administration order—Responsibility of executors—Charging executors with interest.

Executors claimed compensation in respect of collections amounting to \$29,000, and of disbursements amounting to \$5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the directions of the Master. An item

introduced on each side of the account was a transfer of a mortgage to the plaintiff, amounting to \$4,684.47 which was carried out in pursuance of an arrangement made by the solicitors and sanctioned by the Master. It also appeared that the plaintiff's solicitor collected and handed over to the executors \$2,400, and also made a payment to them of \$10,000 for which he was personally liable.

Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced to \$440.00. Nothing was allowed in respect of the item of \$4,684.47; one per cent. was allowed in respect of the items of \$2,400 and \$10,000; two and a half per cent., on the balance of the collections; and five per cent., on the disbursements, except the transfer.

The executors retained in their hands a sum of \$100 to meet claims against the estate, and were not called upon to pay it into court.

Held, that the amount retained was not unreasonable and that the executors were not chargeable with interest in respect to it.

W. H. C. Kerr, for the plaintiff.

Hoyles, for the executors.

[PROUDFOOT, J., 12TH APRIL, 1886.]

MOORE v. MOORE.

Dower—Pleading and Practice—Dower Procedure Act.

The writ of summons was indorsed under the Judicature Act with a claim for dower and arrears of dower. The defendants entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. cap. 55. The plaintiff delivered a statement of claim taking no notice in it of the acknowledgment and consent, and claiming dower and arrears.

Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the Judicature Act, be compelled to take any steps under the Dower Act.

Hoyles, for the plaintiff.

Rae and Holman, for the defendants.

[28TH APRIL, 1886.]

GORDON v. GORDON.

Will, construction of—Power to sell—Power to mortgage—Estate deriving benefit of loan—Lien—Ranking of mortgage.

A testatrix by her will devised and bequeathed the residue of her real and personal estate to R. G., her executor, "upon trust to sell my real estate either together or in parcels, and either by public auction or private contract with power to insert any special or other stipulations in any contract * * * and to call in and convert into money the remainder of my personal estate * * * and I declare that the said trustee shall out of the moneys to arise from such sale, calling in and conversion, and out of the money of which I shall be possessed at my death," pay off an encumbrance on a certain piece of land specifically devised to her four children, her funeral and testamentary expenses and her other debts, and divide the balance amongst her four children. There was also a direction for investing and disposing of the annual income of the fund so to be produced. R. G. mortgaged the residue of the realty to T. at 12 per cent. per annum, and out of the proceeds paid a portion of the incumbrance on the land specifically devised, and applied the balance to his own use. The executors of T. obtained judgment against R. G. on the covenant contained in the mortgage, and in this action (administration) claimed against the general estate for a debt due by the estate. The Master at Belleville allowed the claim in full, but ranked it after mortgages of the shares of the specific devisees.

Held, that the words of the will did not authorize a mortgage of the residue, but a sale only; that the mortgage to T. was invalid; and that the executors of T. had no higher claim on the judgment than they would have had on the mortgage. But,

Held, that, as the estate benefitted by the application of part of the mortgage money to the incumbrance, the executors of T. should have a lien on the general estate for the amount of the money so applied, with interest at six per cent.

Held, also, that the claim was properly ranked after the mortgages of the shares of the specific devisees, as they took their mortgages without notice of the dealing by the executors with T.

Clute, for the executors of T., appealing.

J. Hoskin, Q.C.. E. Douglas Armour, Neville, and Kappelle, for various parties, contra.

[ARMOUR, J., 4TH MAY, 1886.]

LAIDLAW MF'G. CO. v. MILLER.

Judge in Chambers—Divisions of High Court—Distribution of business.

There is now only one Superior Court of original jurisdiction—the High Court of Justice. The different divisions exist merely for convenience in the distribution of work. There is no reason why a Judge of the Queen's Bench or Common Pleas Division should not hear a chamber motion in an action in the Chancery Division, even where it is not a matter of urgency, and where it might as easily have been brought before a Judge of the Chancery Division.

W. H. P. Clement, for the plaintiffs.

Holman, for the defendants.

Second Division Court, Lincoln.

CASE v. ST. CATHARINES OPERA HOUSE CO.

Ticket for reserved seat—Action by ticket holder for breach of contract—Statute of frauds.

Held, that the holder of a ticket for a reserved seat in a theatre can maintain an action for breach of contract against the seller of the ticket if he is not allowed to occupy the seat reserved.

Held, also, that it is not an agreement respecting an interest in land within the Statute of Frauds.

The plaintiff purchased at the defendants' office six tickets for reserved seats for the performance of the Mikado, and paid \$6 for them. Each ticket had a coupon attached, showing the row and number of the seat. The form of the ticket was as follows :

| | | | | |
|----------|------------------------------|-------|----------|-------------|
| THURSDAY | OPERA HOUSE, ST. CATHARINES. | | | Row. |
| | ADMIT ONE. | | | No. |
| | H. G. HUNT, | - - - | MANAGER. | PARQUETTE. |
| | PARQUETTE. | | | RETAIN THIS |
| | RESERVED SEAT. | | | CHECK. |

The tickets were numbered from 12 to 17 in the same row.

On the evening of the performance the plaintiff, with five others, went to the Opera House at the proper hour, but found that two of the six seats for which he held tickets were occupied by other persons who refused to vacate them. The manager, on application to him, declined

to compel them to give up the seats, and offered the plaintiff two other seats immediately behind those reserved by him in lieu of the two which were occupied. The plaintiff insisted upon having the seats his tickets called for, and not being able to get them left the theatre with his party. He then brought this action for damages for breach of contract. The defendants set up the Statute of Frauds.

Keyes, for the plaintiff.

R. Gregory Cox, for the defendants.

SENKLER, Co. J., 27th April, 1886.—The defence of the Statute of Frauds, I presume, means that the defendants contend that the sale of a ticket of admission to a theatre for a reserved seat is a contract respecting an interest in land, and therefore no action can be brought upon it unless it is in writing and signed by the party to be charged or his duly authorized agent.

The nature of a right to come and remain on the land of another was discussed at some length by the late Baron Alderson in the well-known case of *Wood v. Leadbitter* (a), where the plaintiff having purchased a ticket of admission to the grand stand on a race course, and having in pursuance of it entered the stand, was ordered off by the steward and forcibly removed, and thereupon brought an action of trespass against the persons removing him, and it was held that he could not recover. It was held (and this was hardly disputed) that no incorporeal inheritance, either for life, or for years, can be granted without deed, and also that a mere license is revocable even if granted by deed and for a price paid. A license, however, which comprises or is connected with a grant cannot be revoked so as to defeat the grant; and this is equally true of a license by deed and of one by parol, provided the grant connected with it is one which can be made by parol. That case shews clearly that if the defendants had turned the plaintiff out of the theatre the plaintiff would not have maintained an action of trespass. The present action is, however, of a different nature, being an action for breach of the contract; and the judgment in *Wood v. Leadbitter* carefully explains that the question of the plaintiff's right to maintain such an action is not touched by it, and in discussing the case of *Wood v. Lake*, which was relied on by the plaintiff in *Wood v. Leadbitter*, Baron Alderson remarked that that action may have been a mere *assumpsit*, and in such an action the plaintiff would certainly be entitled to recover if the contract was not (and probably the Court considered it was not) a contract concerning land within the 4th section of the Statute of Frauds.

The facts in *Wood v. Lake* were that a parol agreement had been entered into for liberty to stack coals on part of a close for seven years, and that the grantee should have the sole use of that part of the close during the term. The grantor after the expiration of three years closed his gates and forbade the grantee to stack any more coals. The Court held that the agreement did not amount to a lease or uncertain interest in land.

Lord St. Leonard, in his work on Vendors and Purchasers (14th Ed. p. 124), intimates that the case could not be distinguished from an

(a) 13 M. & W. 838.

(b) Sayer, 3.

actual demise. He does not, however, express any opinions as to whether the agreement was respecting an interest in land outside of the question of its being a lease.

Baron Alderson does not seem to disapprove of the Court having considered the contract was not one concerning land in *Wood v. Lake*. It would, perhaps, be more correct to say that he refrains from expressing any opinion on the point.

A contract or agreement to occupy lodgings at a yearly rent payable quarterly (the occupation to commence at a future day) is an agreement relating to an interest in land within the statute (c). A parol agreement, however, to pay \$200 a year for the board and lodging of a person and his servant, and accommodation for his horse, at a boarding house, is not a contract for any interest in or concerning land, and an action can be maintained for the breach of it by refusing to go to the house, although the contract was unwritten. In giving judgment, Cockburn, C. J., said that the contract amounted to no more than a permission to the defendant to come and reside in the house, and added that the decisions under the 4th section of the Statute of Frauds had gone quite far enough, and that it would lead to most absurd and inconvenient consequences to hold that such a case fell within the section.

Mr. Cox argued for the defendants that the case resembled that of an agreement to occupy lodgings, as the contract was for certain specific seats, and therefore something more than a mere license to enter the theatre. I do not think this analogy holds good. The agreement to take lodgings, when perfected by entry, amounts to a demise, and pending entry, gives to the person entitled to enter an *interesse termini*, which as an interest in land falls within the 4th section (per Crompton, J., in the case last cited), and after entry the tenant could maintain trespass against any one coming into the rooms against his will. After taking possession they are his, whether he is in them or not. Can it be urged that the right to occupy seats in a theatre can amount to a demise? or that if the occupant should leave them during the performance, and another person sit down in them, the latter would be liable to an action of trespass? No doubt he could be removed by the authorities of the theatre, but I doubt if the original purchaser would be justified in resorting to force to expel him. The nature of the occupancy of the seat differs materially from that of the lodgings. In the present case the seats are fixed to the floor, but in many theatres, part at least of the seats are ordinary chairs, and could one of these be the subject of a demise?

In my opinion the contract between the parties was simply that the defendants agreed to allow the plaintiff and his party to enter the theatre on the night in question during the performance of the play, and to reserve for his accommodation certain seats; [that the agreement did not amount to a demise or effect any interest in land, but was merely personal, and did not require to be authenticated by any writing.

Judgment for the plaintiff for \$10 damages and costs.

(c) *Inman v. Stamp*, 1 Stark. 12; *Edge v. Stafford*, 1 C. & J. 391.

MANITOBA.

In the Queen's Bench.

BAYNES v. METCALF.

Security for costs—Præcipe order—Waiver of security by proceeding in the cause.

Held, that a *præcipe* order for security for costs may be issued by the clerk of Records and Writs.

The defendant obtained a *præcipe* order for security for costs with a stay of proceedings. The plaintiff, treating that order as a nullity, noted the bill *pro confesso*. The defendant then applied to the referee for another order for security. This order was granted. From it the plaintiffs appealed, upon the ground that the bill was taken *pro confesso* against the defendant, and that the defendant had waived his right to security having previously made an application to stay all proceedings until the costs of a prior suit had been paid.

Held, (i) that the *præcipe* order was valid. (ii) That for that reason the Referee's order for security should be reversed. (iii) That the defendant had not waived his right to security by moving to stay proceedings.

TEES v. SPENCE.

Interpleader bill—Demurrer—Defendant's title not shown.

The bill stated that the plaintiff agreed with A. and B. to purchase from them certain land upon certain terms; that he had paid them a portion of the purchase money; that A. claimed the balance, and that B. and X. also claimed it.

Held, upon demurrer for want of equity, that the bill sufficiently disclosed the nature of the opposing claims.

REGINA v. SCOTT.

Criminal law—Trial before Superior Court Judge under speedy trials Act.

A prisoner charged with the crime of forgery cannot be brought up before a Judge of the Court of Queen's Bench under the speedy trials Act.

McKILLIGAN v. MACHAR.

Constitutional law—Parliament of Canada—Act respecting evidence in questions affecting land in province—Public document, proof of by certified copy.

Held, that an Act of the Parliament of Canada, 46 Vict. cap. 17, sec. 2. s.-s. 4, making provision as to the nature of the evidence to be received in determining the right to, or property in, lands in this Province is *ultra vires*.

By the Imperial Statute 14 and 15 Vict. cap. 99, sec. 14, certain provision is made for the proof of books and documents of a public nature by the production of an examined copy "provided it purport to be signed and certified as a true copy by the officer to whose custody the original is entrusted." A copy of a book, within this statute, certified by "A. Russell, acting Surveyor General," the original of which was proved to be in the Department of the Interior, in the Dominion Lands office at Ottawa, was offered in evidence.

Held, not sufficient evidence, without proof that A. Russell was the officer to whose custody the original had been entrusted.

FONSECA v. MACDONALD.

Bill to realize registered judgment—Multifariousness—Exemptions.

The plaintiff had a registered judgment against five defendants. Upon a bill filed to obtain a sale of lands held by each defendant in severalty,

Held, (i) that the bill was not multifarious. (ii) That no personal order for payment could be made. (iii) That a bill, and not a petition in the old suit, was the proper proceeding. (iv) That such a suit need not be

preceded by any proceeding upon execution or otherwise. (v) That such a bill should shew that the lands are not exempt from seizure.

Real Estate Loan Co. v. Molesworth, 3 Man. L. R. 176 followed as to personal order for payment.

McMILLAN v. BYERS.

Lien—Written agreement—Contemporaneous parol agreements.

Held, that a workman employed to cut trees into cord-wood has not at common law a lien for his wages : but if he contracts to haul, as well as cut, the wood, he may have a lien for the carriage.

Held, also, that a common law lien is lost by the sale of the article.

A. made an agreement in writing with B. that he, A., would cut certain trees into cordwood and would haul it to, and deliver it at, S. station ; and B. agreed to pay certain prices, paying 80 per cent. upon delivery at the station and the balance upon the completion of the work. Contemporaneously, the parties verbally agreed that if the contract prices were not paid upon the completion of the work the wood was to become the property of A. and that he was to be at liberty to sell it.

Held, that evidence of this verbal agreement was admissible, even in an action to which third persons were parties.

THE CANADIAN LAW TIMES.

VOL. VI.

JULY, 1886.

No. 9.

DISTRESS CLAUSES IN MORTGAGES.

TERMINATION of *Tenancy*.—Where the tenancy created by the attornment clause is a tenancy at will, it behooves the mortgagee, before distraining under the clause, to consider whether the tenancy has not been terminated by the will of either of the parties. Thus, in *Pinhorn v. Sonster* (a), the mortgage in question contained a clause whereby the mortgagor became tenant at will to the mortgagee. The latter distrained upon the goods of a third person upon the mortgaged premises, and his right to do so was contested upon the ground that the mortgagor had, after the date of the mortgage, and before the time of the distress, assigned and transferred all his interest in the mortgaged premises to the person who was in occupation thereof at the time of the distress, by reason of which assignment it was contended that an end had been put to the tenancy at will. It was held, however, that the assignment in question had not terminated the tenancy, as no notice of the assignment had been given to the mortgagee (b).

From this it would appear that neither party to a tenancy at will can by any act of his own put an end to the tenancy until notice of such act be given to the other party to the tenancy.

(a) 8 Ex. 763.

(b) This case was followed by *Melling v. Leak*, 16 C. B. at 669.

Apparently an end will not be put to a tenancy at will by the fact that the tenant, even with notice to his landlord, has without parting with all his interest in the demised premises sublet the same; for such an act upon the part of the tenant is quite consistent with the continued existence of his own tenancy. In *Doe d. Goody v. Carter* (c), Paterson, J., says: "A tenant at will cannot, as against the landlord to whom he is tenant, constitute another person tenant at will; but he can make a tenant at will as against himself."

It would also appear from the extract from *Carpenter v. Colins* (d), cited with approval in *Pinhorn v. Sonster* (e), that a tenancy at will would not be terminated by the tenant at will being ousted by a stranger, unless the landlord has notice of such ouster.

Form of attornment clause.—"The following form of an attornment clause will probably be found to be generally useful: "Without prejudice to the mortgagee's right to immediate possession on default or to the right of subsequent incumbrancers to take possession, the mortgagor doth attorn and become tenant to the mortgagee from year to year at a yearly rental equivalent to, applicable in satisfaction of, and payable at the same times as the interest hereinbefore provided to be paid, it being agreed that neither the existence of this clause nor anything done by virtue thereof, shall render the mortgagee a mortgagee in possession or accountable for any moneys except those actually received by virtue thereof."

The attornment clause is not merged in a judgment on the covenant for payment of the amount of the mortgage debt.—At first thought it might appear that a judgment recovered upon the covenant for payment contained in a mortgage for the full amount of the mortgage debt would operate to merge therein an attornment clause contained in the mortgage and thus to prevent a distress being made under such clause after the entry of such judgment, but "The

(c) 9 Q. B. at p. 865.

(d) Yelv. 73.

(e) *Supra*.

principle of *transit in rem judicatam* only relates to the particular cause of action in which the judgment is recovered, and does not operate upon any concurrent remedy which the creditor may have until it be made productive in satisfaction to the party" (f).

Lord Ellenborough, in *Drake v. Mitchell* (g), says: "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have."

Application of 49 Vict. cap. 29.—The Legislature of the Province of Ontario, in the year 1886, passed an Act which touches upon the questions discussed in the present article. Section 3 of that Act provides that "the right of a mortgagee to distrain *for interest* in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as are not exempt from seizure under execution. This section shall not apply to existing mortgages." The Act in question was assented to on the 25th day of March, A. D. 1886, and as will be, seen, it applies to such mortgages only as may be made after that date, and the question arises as to the effect of the Act upon the mortgagee's right of distress under mortgages made before that date. It will be remembered that it was contended in *The Royal Canadian Bank v. Kelly*, and in *The Trust and Loan Co. v. Lawrason*, on behalf of the mortgagees, that a mortgagee is, under and by virtue of what is known as the distress clause contained in the statutory short form of mortgage, entitled by distress to recover his overdue interest by way of rent reserved, and that any such right on the part of the

(f) Coote on Mortgage, 4th Ed. 643; and see Fisher on Mortgage, 4th Ed. 767 *et seq.*

(g) 3 East at p. 258.

mortgagee was finally negatived in the latter case. The enactment in question would appear to be a statutory declaration of the law as laid down upon this point in *The Trust and Loan Co. v. Lawrason*, and does not appear to go any further. It has already been shown that a *real tenancy at a real rent* may be created by an attornment clause in a mortgage, and it would seem that a right of distress under such a tenancy is in no way touched by the enactment in question, which is by its terms confined to cases of distress for interest in arrear and does not include cases of distress for rent in arrear. The question can be in no way affected by a provision in the mortgage that when the rent is recovered by distress *qua* rent, the amount so recovered is to be received by the mortgagee in satisfaction not only of the rent due but also of the interest due under the mortgage.

The mortgagees' argument in Lawrason's case.—We have already seen that the case of *Trust and Loan Co. v. Lawrason* turned upon the construction of the particular mortgage instrument there in question, and that the question which really there arose for decision was whether or not the form of mortgage there in question created the relationship of landlord and tenant between the mortgagor and the mortgagees at a rent certain. The appellants' argument as set forth in their Factum may perhaps be deemed to possess sufficient interest to warrant its being herein set forth.

APPELLANTS' FACTUM IN TRUST & LOAN CO. v. LAWRASON.

I. This is a special case submitted by consent of the parties under the following circumstances:—

The Honourable David Christie, being seised of certain lands, mortgaged the same to the appellants and made default in payment. The mortgagor retained possession of the mortgaged lands under and pursuant to the provisions of the mortgage. The respondents are execution creditors of the said mortgagor, and the sheriff under and by virtue of their executions, seized, sold and removed the goods and chattels of the said mortgagor then being upon

the mortgaged premises while the mortgagor was so in possession thereof as aforesaid.

The said mortgage was in the statutory short form (see R. S. O. cap. 104) with certain additions, among which is an attornment clause whereby it is provided that the mortgagor "doth attorn to and become tenant at will to the company (*i.e.* the appellants) subject to the said proviso" (*i.e.* the proviso for redemption).

The appellants assumed the position for which they now contend, that upon the construction of the said mortgage, and particularly upon that of the statutory distress clause therein contained, when read together with the aforesaid attornment clause, they became landlords of the mortgaged premises and the mortgagor became their tenant at a fixed rent, namely, a rent equivalent to the interest by the mortgage reserved.

The appellants thereupon and while the proceeds of said goods and chattels were in the hands of the sheriff, claimed (by virtue of 8 Anne, cap. 14, sec. 1) to be entitled to one year's rent of the mortgaged premises before payment over of the proceeds of said goods and chattels to the respondents.

Upon such claim being made the sheriff interpleaded and the said special case was submitted for the judgment of the Court of Queen's Bench for Ontario, which Court gave judgment in favour of the appellants; but this judgment was reversed by the Court of Appeal, and it is from the judgment of the latter Court that the appellants now appeal.

II. It is admitted by all the learned Judges of both of the Courts below, and it is submitted that in the present state of the authorities (cited by these appellants in the Court of Appeal) it is beyond all reasonable doubt, that it is quite competent for a mortgagor and mortgagee by the terms of their mortgage contract to constitute between themselves the relationship of landlord and tenant with all its accompanying incidents. The main question, therefore, that arises in the present case is one of construction

of the particular instrument in question, whether that instrument created between the mortgagor and mortgagees the relationship of landlord and tenant at a fixed rent. Upon establishing this in the affirmative the appellants must necessarily succeed.

The proper construction of the instrument in question may be best arrived at by applying to it the ordinary rules which judges and jurists have framed for the interpretation of written contracts.

III. "All the clauses of covenants are to be interpreted one by another in giving to each of them the sense which results from the whole; for it is one entire deed which ought to agree with itself, and all the words take effect by one livery and all tend to one end and purpose. All deeds are but in the nature of contracts and the intention of the parties reduced into writing; and the intention is chiefly to be regarded:" *Fonblanque* Eq., Bk. 1, cap. 6, sec. 13.

"The construction ought to be made upon the entire deed and not merely on any particular part of it; and therefore every part of a deed ought if possible to take effect and every word to operate:" *Jackson v. Blodgett*, 16 Johns. Rep. (N. Y.) 178.

"It is a rule both in law and equity so to construe the whole deed or will as that every clause should have its effect:" *Butler v. Duncomb*, 1 P. W. 457, Per Ld. Chr. Parker.

"We do not do justice to the parties unless we look to the whole deed and infer from that their real intention:" *Browning v. Wright*, 2 B. & P. 26, per Buller, J.

"It is immaterial in what part of a deed any particular covenant is inserted; for in construing it we must take the whole deed into consideration in order to discover the meaning of the parties:" *Duke of Northumberland v. Errington*, 5 T. R. 526, per Buller, J.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to

collect from the whole one uniform and consistent sense, if that may be done:" *Barton v. Fitzgerald*, 15 East 541, per Ld. Ellenborough, C. J.

"When two or more deeds or instruments act upon one and the same subject matter they ought to be considered and construed as one and the same instrument, and each is made auxiliary to the other in order to come at the true meaning of both; in like manner one part of the same deed or instrument ought to be made auxiliary to the other in order to come at the true sense and meaning of the whole:" *Atkinson v. Pillsworth*, 1 Ridg. P. C. 461 and 462.

"We ought to interpret one clause by the others contained in the same Act whether they precede or follow it." *Pothier on Obl.* Pt. 1, cap. 1, sec. 1, Art VII, Rule 6. (Translated by Evans).

"All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act:" Civil Code of L. C. 1018.

The appellants submit that the learned judge who delivered the judgment of the Court of Appeal fell into the error of construing the instrument in question clause by clause, and treating each clause as an independent contract, either hostile to its neighbour or requiring and deriving no light from it. The true construction may be arrived at by reading the attornment clause together with the distress Clause and the proviso for redemption. Upon such a reading it will be found that there is a tenancy created at a fixed rent. (See section 9 of this Factum).

IV. "We conceive it to be a rule of construction of known and approved use that no words in any deed or instrument which may have a significant and operative meaning without injuring the natural and obvious sense of any other part of the deed or instrument, shall be regarded as nugatory and redundant:" *Atkinson v. Pillsworth*, 1 Ridg. P. C. 461.

"When a clause is capable of two significations it should be understood in that which will have some operation rather than that in which it will have none:" *Pothier on Obl.*, Pt. 1, cap. 1, sec. 1, Art. VII., Rule 2. (Translated by Evans).

The attornment clause here, if not construed together with the distress clause, so as to create a tenancy at a rent certain, will either be of no effect or will be a *clausula damnosa* so far as the mortgagees are concerned, rendering them liable, in the character of mortgagees in possession, to account to subsequent incumbrancers for rents and profits which by the terms of the contract they have debarred both themselves and the subsequent incumbrancers from collecting. The instrument being intended solely as a security for money, it could never have been intended by the parties to it that it should have any such prejudicial effect upon the mortgagees, and the above authorities show that it should not be treated as inoperative. It would therefore appear that the attornment clause and the distress clause must be so read and construed together as to create a tenancy at a fixed rent.

V. "It is a sound rule of construction that a covenant introduced *ex industria* into an instrument shall be deemed to have been inserted for some purpose, and that the purpose was not to leave the rights of the parties as they would have been had no such covenant existed:" *Airey v. Merrill*, 2 Curt. (U. S. Circ. Ct.) 10.

"In construing an instrument consisting of a printed form, with blanks filled in, in manuscript, the words super-added in writing are entitled to have a greater effect attributed to them than the printed words." 1 Phillips on Insurance, sec. 125. See *Am. Express Co. v. Pinckney*, 29 Ill. 392; *Harper v. Albany Mutual, &c. Co.* 17 N.Y. 198.

"I think where there are mere formal and general words which are always put into contracts, and are customary terms, and there are other special and peculiar words, I think, where one is to overpower the other, and to have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract have been more considered and more thought of than those merely ordinary words, * * * and consequently the written terms would be more considered by him; and if they conflict and cannot be reconciled, then the written terms, those more special terms thought of

by himself, may be considered to be more thought of, and consequently to have more weight by him :” *Gumm v. Tyrie*, 33 L. J. N. S. Q. B. 111, per Blackburn, J. ; to same effect see *Joyce v. The Realm Ins. Co.*, L. R. 7 Q. B. at p. 588.

The mortgage in the present case conforms to the statutory short form of mortgage throughout, with the addition, however, of some further clauses, one of which is the attornment clause. If this latter clause should be thought to conflict with any of the clauses contained in the statutory short form, then upon the authority of the above citations it should be treated as the governing clause. Moreover, it is stated in the special case that the mortgagor “remained in actual possession of the said lands and premises *under and pursuant to the provisions of said mortgage* from the date thereof until after the directing of the interpleader issue herein,” and it also appears therefrom that default was made in payment of the mortgage moneys within a few months after the date of the mortgage, while an examination of the mortgage itself will show that the attornment clause *contains the only provision under and pursuant to which the mortgagee could remain in possession after default.*

VI. The interpretation of a contract must in some manner be governed by the subject-matter to which it relates : *Robinson v. Fiske*, 25 Me. 401 ; *Higgins v. Wasgatt*, 34 Me. 305 ; *Phelps v. Bostwick*, 22 Barb. (N.Y.) 314 ; *Houston v. Barry*, 5 Ir. Eq. R. 294.

In case of ambiguity or uncertainty in an instrument which purports to be a security, it will be so construed as best to effectuate its said purpose : *Jerome v. Hopkins*, 2 Mich. 100.

“Where the terms of a contract are capable of two constructions, we ought to understand them in the sense which is most agreeable to the nature of the contract.” *Pothier* on Obl. Pt. 1, cap. 1, sec 1, art. vii. rule 3. (Translated by Evans).

“Expressions susceptible of two meanings must be taken in the sense which agrees best with the matter of the contract.” Civil Code of L. C. 1015.

The whole purpose of the instrument in question herein is to furnish a security for money lent. This purpose affords a key to the construction of the instrument which should be so construed as best to effectuate that purpose.

In delivering judgment on the appeal in *Morton v. Woods*, L. R. 4 Q. B. 305, Lord Chief Baron Kelly, after noticing the appellant's contention that there were certain defects in the form of the mortgage instrument there under consideration which rendered it invalid as a lease, says, "It might be so in the ordinary case of a lease; but in order to ascertain whether such a rule of construction has any application to the present instrument, we must take into consideration the whole scope and object of it. And when we find the main and indeed only object of the deed is a mortgage, and that the creation of a tenancy and the relation of landlord and tenant with a reservation of rent are intended as a mere security for the repayment of the mortgage money and interest, the authority cited is no longer applicable; and we must look at the whole instrument taken together in order to ascertain the intention of the parties."

If the mortgage in question herein be construed according to the rule enunciated in *Morton v. Woods*, there can be no reasonable doubt that the relationship of landlord and tenant at a fixed rent was thereby created.

VII. "A deed imports consideration and is for the advantage of the grantee alone; and, therefore, if there be any doubt in the sense, the words are to be taken most strongly against the grantor." *Fonblanque Eq.*, Bk. 1, cap. vi. sec. 19.

"The principle of construction of covenants is that they are to be construed most strongly against the covenantor and most beneficially in favour of the covenantee." *Warde v. Warde*, 16 Beav. 105, per Sir John Romilly, M. R. See also to same effect *Earl of Shrewsbury v. Gould*, 1 B. & Al. 5, 494, per Bayley, J.; *Barton v. Fitzgerald*, 15 East 546, per Bayley, J.; *Browning v. Wright*, 2 B. & P. 22, per Ld. Eldon.

“ Where the true import and meaning of a written instrument is doubtful, and the intention of the parties cannot be determined from its language, the right doctrine is that it shall be construed most strongly against the person using the doubtful language and in favour of him who has been misled and advanced his money upon it.” *Barney v. Newcomb*, 9 Cush. (Mass.) 56 ; and see *Evans v. Sanders*, 8 Port. (Ala.) 497.

The rule that a contract is to be construed most strongly against the obligor applies as well to indentures as to deeds poll, for the reciprocal obligations of the former may be analysed and dealt with separately, each party thereto being treated as an obligor with respect to the duties cast upon him. This proposition may be illustrated by reference to the rule of the Roman Law that reciprocal contractual obligations (*verbis*) must be created by separate and distinct stipulations.

The rule of the Roman Law and of the modern Civil Law is that an ambiguous contract will be interpreted to the disadvantage of the stipulator. The rule of the English Law as above set forth in the citation from *Warde v. Warde* does not conflict in principle with the more ancient rule which took its origin from the fact that the terms of the stipulation were necessarily in the words of the stipulator who was the party to be benefitted by the contract, while in the English Law the terms of a grant or covenant are in the words of the grantor or covenantor, and are therefore to be construed most strongly against him.

Quite apart, however, from the above considerations, the instrument in question, although in the form of a deed *inter partes*, is executed by the grantor only, and the terms of the deed are therefore in his words, and, for the purpose of applying this rule of construction, the instrument should be treated as a deed poll, and should be construed most strongly against the grantor.

VIII. It therefore appears, that the proper construction of the instrument in question must be collected from the terms of the *whole instrument*, and that the various clauses are to be interpreted the one by the other (Section 3 of

Factum); that every clause is, as far as possible to be treated as operative (Section 4 of Factum); that a clause inserted into an instrument *ex industria* shall control any other clauses that may appear to be inconsistent with it (Section 5 of Factum); that the interpretation of a contract must be governed by its subject matter, and when it purports to be a security for money, it will be so construed as best to effectuate that purpose (Section 6 of Factum); and that the instrument in question should be construed most strongly against the mortgagor (Section 7 of Factum).

IX. By the wording of the distress clause in question, rent and interest are equivalent and interchangeable terms. The effect of this is to reduce the arrears of interest to the extent of whatever amount of interest may be collected *by way of rent*. This avoids the difficulty raised in some of the cases decided under other distress clauses, where it was objected that there was no provision for the application of the rent in payment of the interest. This equivalence of the rent to the interest also establishes the fact that the rent is fixed and certain, for there is no question but that the interest reserved by the mortgage is fixed and certain, and so must that be which is its equivalent. The distress clause provides that as soon as the interest falls into arrear it may be recovered "by way of rent reserved." Upon reference to Webster's Dictionary, under the word "way," it will be found that the phrase "by way of" is equal to the phrases "as being," "in the character of," which latter is the meaning given to it by Mr. Justice Gwynne in *Royal Canadian Bank v. Kelly*, 19 C. P. 211, where he considers that the rent is fixed by the use of this phrase. Upon substituting either of these two phrases, "as being," "in the character of," for its equivalent as used in the statutory distress clause, it will appear that the distress clause indicates not only the *mode in which the overdue interest may be recovered*, but also, *the character in which it is to be recovered*, viz., as a rent. See judgment of Chief Justice Hagarty, 45 U. C. R. at p. 184, and Osler, J., 6 App. R. at p. 306, and judgment of Mr. Justice Gwynne in *Royal Canadian Bank v. Kelly*, 19 C. P. 211.

Upon a proper construction of the mortgage in question and upon application of the maxim *Id certum est quod certum reddi potest*, the rent secured by the mortgage is sufficiently fixed. See judgment of Hagarty, C. J., 45 U. C. R. at p. 184, and the judgment of Mr. Justice Osler, 6 App. R. at p. 307.

X. In order to enable a landlord to avail himself of the provisions of the Statute of Anne it is not necessary for the instrument under which the tenant holds to contain words of demise, nor is it necessary that the sum reserved to the landlord should be named as rent if it appears upon the construction of the whole instrument that the parties intended to constitute the relationship of landlord and tenant: *Saunders v. Musgrave*, 9 D. & Ry. 529; and see report of same case, 6 B. & C. 524, from the head-note of which it appears that it was a case under the Statute of Anne.

XI. The case of *Clowes v. Hughes*, L. R. 5 Ex. 160, relied upon by the respondents, was a case where, by the terms of the mortgage, a tenancy was to arise only upon default being made in payment of the mortgage moneys, the mortgagor in the meantime being allowed to hold as mortgagor, and it was held that, even after default occurred, a notice from the mortgagee to the mortgagor was necessary in order to alter the tenure of the latter from that of mortgagor in possession to that of tenant of the mortgagee.

It is submitted that *Clowes v. Hughes* is bad law, but in any event it is clearly distinguishable from the present case where, by virtue of the attornment clause, the mortgagor became tenant at will to the mortgagees immediately upon the execution of the mortgage. Here the only change to take place upon default was in the character of the moneys recoverable under the mortgage. Until default these moneys were to be paid as interest; but immediately upon default being made, the mortgagees were entitled to these moneys—"By distress warrant to recover *by way of* rent reserved," that is, *as being* rent reserved. Until default in payment of interest the mortgagor held, as tenant at will, rent free. Upon default being made the mortgagor still held as tenant at will, but his rent became fixed.

XII. A point is made in the judgment of Patterson, J., 6 App. R. at p. 301, also in the judgment of Burton, J., 6 App. R. at pp. 294 and 295, of the fact that in the long form of the Statutory Distress Clause, from which the lastly quoted words are taken, the said words are followed by the clause "As in the case of a demise," and it is argued from this that it is indicated by the lastly mentioned clause that the statutory Short form of mortgage does not create the relationship of landlord and tenant between the mortgagor and mortgagee. Whether this be a proper deduction or not, it has no bearing on the present case, for here *there is a demise*, or what is equivalent to it, an attornment by the tenant. All that is here required is to show that there is a fixed rent, and that there is such appears by the foregoing sections and especially section 9 of this Factum.

XIII. It was objected in the Court below that the various statutory clauses relating to possession contained in the mortgage in question are inconsistent one with another, and inconsistent with the attornment clause. It has been already shown by section 5 of this Factum, that in case of any such inconsistency the Attornment Clause should prevail. For a construction harmonising the various clauses as to possession, see Leith's Blackstone (2nd Ed., by Smith) page 226, and see judgment of Mr. Justice Osler, 6 App. R. at pp. 307 and 308. It is submitted that it is not necessary for the appellants to show the exact nature of the tenancy under which the mortgagor held. It is sufficient if they show that there was a tenancy of any kind and that it was at a fixed rent. That there was a tenancy of some kind is sufficiently shown by the special case when it is admitted that the mortgagor "Remained in actual possession of the said lands *under and pursuant to the provisions of the said mortgage* from the date thereof until after the directing of the interpleader issue herein." That such tenancy was at a fixed rent is shown by the reasons herein set forth.

A. H. MARSH.

TORONTO.

EDITORIAL REVIEW.

Filing Reports.

We have again to recur to this subject, as it is becoming more and more evident that the present practice has no system in it, and entails a great deal of trouble.

The Rule declares that "reports shall be filed in the office where the proceedings are carried on, and shall at the request of any party to the proceedings be forwarded, in cases pending in the Queen's Bench and Common Pleas Divisions, to the office of the Registrar of the Division in which the action is pending, and in cases pending in the Chancery Division to the office of the Clerk of Records and Writs."

The first defect in the rule is that it assumes that all reports are made in the country. What then is to be done with reports of the Master in Ordinary? Take the case of an administration order made in chambers on a summary application. A reference is made to the Master in Ordinary. With the exception of the motion in chambers, and a final motion for distribution of funds made in the same place, all proceedings are carried on in the master's office. If any proceedings (within the meaning of the term as used in the rule) are carried on elsewhere, the place in which they are carried on is in chambers. This allows a choice of one of two places only in which to file reports in administration matters, in neither of which is a report ever filed as a matter of practice.

If "proceedings" as intended by the rule bears the same construction as "proceedings" as used in Rule 50, then it refers to actions only and not to matters commenced in a summary way otherwise than by writ of summons. But even in the case of an action it may be a matter of doubt

as to where the report should be filed. Take the case of a mortgage action in the Chancery Division commenced by writ. No appearance being entered, a formal judgment referring it to the Master in Ordinary is entered in the registrar's office. New parties are brought in in the master's office and the whole "proceedings," in so far as important proceedings are concerned, are carried on in his office. The report is filed in the office of the Clerk of Records and Writs by common consent, although no prior proceedings have been carried on there.

Again, what is the meaning of the word "proceedings?" The whole proceedings in an action are usually referred to in technical language as "the pleadings and proceedings."

Is a report to be filed where the pleadings are filed, or where the proceedings are carried on whose result it declares? The rule may be read both ways; and is certainly interpreted in both ways by the profession. It not infrequently happens that the proceedings are carried on in two separate offices; and it is possible that a change of reference may add a third office to increase the doubt.

Finally, all reports are appealed from in Toronto; further directions are moved for in Toronto; money is paid into and out of Court in Toronto; and consequently reports are required in Toronto oftener than elsewhere, and therefore should be filed in Toronto.

The British Constitution and the Irish Bill.

The *Law Times* says:—"The question will sooner or later have to be considered from a constitutional point of view whether an Irish Government Bill which impliedly but undoubtedly repeals the 3rd article of the Act of Union (whereby it was agreed that the United Kingdom should be represented in one and the same Parliament), can properly pass into law by a vote of a majority of the House of Commons made up partly by the votes of Irish members, without the votes of whom there would be a majority of British members against the Bill. The Act of Union passed by the assent of two majorities in the Parliament

of Ireland, and a majority in the Parliament of Great Britain. There is very strong reason for saying that, quite apart from the impolicy of repealing the Act of Union on general grounds, to repeal it without the consent of the majority of the representatives of Great Britain would be unfair to the people of that country. For the dissolution of the partnership the same assents would seem to be constitutionally required as were required for the contracting of it."

The principle may be good, but it is difficult of application. What is meant by "constitutionally"? Who are to be the judges of the constitutionality of an Act of Parliament? Not the judiciary who are bound by it and must interpret it as they find it. Not the people, who cannot repeal what the Parliament has enacted. The Parliament is above the constitution and may alter it, and therefore it is not subject to it. It is, of course, possible that the people might express their views "constitutionally" at the polls against separation. The Parliament which they help to form might pass an Act of separation, and yet the Act would be constitutional.

Professional Discipline.

The *Albany Law Journal*, in a recent issue, notices a bill introduced into the Senate of the State of New York during the past session of that body, entitled "An Act to authorize the New York State Bar Association to examine candidates for admission to the bar, and to discipline members of the legal profession." We learn that the bill aims at placing the whole matter of the admission of attorneys absolutely in the discretion of the Association, and empowers it to hear and determine all complaints affecting the "professional conduct and reputation" of members of the bar in that State, in accordance with rules to be prescribed by the Association, which rules shall include penalties of temporary or permanent suspension of the right to practise. The decision rendered is made equivalent to a judgment of the Court. The bill was not reached during the

session in the Assembly, although it was unanimously passed by the Senate, and favourably reported upon by the Assembly Judiciary Committee.

The *Journal* disapproves of both provisions of the bill, and advances very cogent arguments against the passage of that one which would permit officers of a Court to hold their office at the judgment, pleasure or caprice of other officers "as amenable to discipline as themselves."

Speaking with some experience in this matter, for a very similar system has prevailed in this Province for years, we think that the provision with regard to admission will be found unobjectionable; but we are not so confident as to the disciplinary clause. The first probably works but little change in the prevailing system—the appointment of examiners, as we understand it, being transferred from the Court to the Association.

We regard the disciplinary provisions as wrong in principle. A judge should be further removed from the person upon whose conduct he is called to pronounce than such a system permits. Although the tribunal contemplated may be strictly "of one's peers," yet, considering the important issue at stake upon every enquiry in which its jurisdiction is invoked—no less than a man's reputation and means of livelihood—the accused's right of access to the ordinary tribunals, and to the very highest of them, should he wish to approach it, ought not to be restricted or hampered. It is possible that the right of appeal is not denied by the bill, but this is not the same thing. On the other hand, a most embarrassing and oft-times painful responsibility is thrust upon members of the bar. They may be called upon to determine disputes between, or affecting, professional friends and intimates, and the fulfilment of their duty is apt to result in misunderstandings, or ill feeling, or the rupture of valued friendships. In cases of doubt, whatever their decision, it is sure to be impugned by friends of the accused, and their motives questioned. From such imputations a member of a Court is removed; the recognized duty of his office is to decide disputes, and his position is such that partiality is

seldom likely to be charged against him, and professional jealousy never.

Altogether, we consider that it would be the part of wisdom if the profession in New York declined the honour of having this jurisdiction conferred upon any of their number. They will be happier without it.

Costs in Libel Suits.

The question of costs in libel suits where the plaintiff recovers, we may say, formally, is becoming an important one. In England some time ago, if we recollect rightly, a verdict for the plaintiff with one farthing damages was construed into a verdict for the defendant. At the last Spring Assizes a verdict was rendered for a small sum without costs. And another verdict was rendered for the plaintiff without damages. The latter is perhaps the most curious verdict that could be rendered; because, as the jury are the judges of the law as well as of the facts in actions of libel, it is open to the construction that the jury hold the publication to be a libel as a matter of law, but say that the plaintiff suffered no damage. In any other case the judge would have directed them that such and such was the law, and they might have found a verdict for the defendant. But in libel, where they are judges of the law, their verdict involves a construction of the writing in question as well as a finding of the facts. A verdict for the plaintiff settles all questions in favour of the plaintiff. But a verdict for the defendant might be based on any of the questions of construction of writing, publication, etc. It is rather hard on a plaintiff who may be driven to an action in order to vindicate his character, to be subject to the risk of a nominal verdict for himself being turned into a pecuniary victory of the defendant.

Perhaps it would be better not to receive such verdicts.

“Alderson v. Maddison” in the United States.

We learn from the *Law Journal* that in the Supreme Court of Indiana a case parallel to the above in its facts was tried. “An oral agreement was made by a childless husband and wife to treat a child as their own, and to make her their heir and will her at their death or at the death of the survivor, their entire estate, consisting of both real and personal property in consideration of her living with them and performing certain services for them. The girl performed the conditions of the contract on her part.

Held, within the Statute of Frauds and not enforceable; but that the girl was entitled to recover the reasonable value of the services.”

In *Roberts v. Hall*, 2 C. L. T. 497, there was a written agreement, and the case was argued and determined on other grounds than the Statute of Frauds; but the facts otherwise were the same.

REVIEW OF EXCHANGES.

Albany Law Journal.—6th February, 1886.

Sunday Observance. Temperate views are expressed upon the proper observance of Sunday, and with regard to a fitting restriction of trade and of noisy or disorderly gatherings for amusement upon that day. "People now-a-days will have stages, and street cars, and newspapers; there ought to be open livery-stables, for emergencies, although it would be better to drive for pleasure on Saturday; there certainly ought to be open libraries and reading rooms, and if there were, there would perhaps not be so much demand for Sunday concerts and theatricals, and Talmage's Tabernacle."

The "Rule in Minot's Case," by FRANCIS B. PATTEN. The Supreme Court of Massachusetts, in the case of *Minot v. Paine*, 99 Mass. 101, established a new rule for the guidance of trustees of property invested in corporation shares. The principle is thus stated: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." The English rule upon this point is formulated, and many decisions examined.

Ibid.—20th February, 1886.

Common Words and Phrases. Manufacture; building; music; road; street; residence—are defined.

The History of Constructive Contempt of Court, by KINAHAN CORNWALLIS. A review of the earlier authorities upon this subject.

American Law Review.—March-April, 1886.

The Legal Status of Sleeping Car Companies, by MORRIS GRAY. The purpose of the writer is to show that a sleeping car company occupies the legal status of an innkeeper, and should be held to all the liabilities of such. The duties and liabilities of common carriers and passenger carriers are first briefly explained. Various objections which have been advanced against holding a sleeping car company liable as an innkeeper are then given and combatted *seriatim*, and a strong argument made out in favour of the proposition contended for. For an argument against this proposition, see *The Responsibility of the Pullman Palace Car Company*, 19 Am. L. R. p. 204. The citations pretty much exhaust the reported decisions upon the subject.

Indian Citizenship, by G. M. LAMBERTSON. A few brief extracts may be made to outline the argument of this thoughtful contribution. "It being here decided by our highest Court that neither the Indian tribes, nor Indians living apart from their tribes, can become citizens without further legislation, let us consider: First, whether it would benefit the Indians to make them citizens at the present time; secondly, is it to the interest of the United States to bestow upon the Indians citizenship; and, thirdly, if the Indians are to become citizens, upon what terms and conditions; and what kind of a law therefor should be enacted." * * *

"The only object, then, in making the Indian a citizen, is to put the ballot in his hand. Is the ballot, even, a greater good than evil to the illiterate and uneducated? * * * To plunge the Indian, who has known but little of law, and nothing of civilized government, who is slowly emerging from a semi-savage condition, gradually adopting our habits and modelling his life after that of the civilized whites, into the heat of partizan struggles, is to utterly demoralize him, and undo what has been done for his advancement.

"When we remember that our country is being invaded, year after year, by the undesirable classes driven out of Europe because they are a burden to the government of their birth; that as many as seventy thousand immigrants have landed on our shores in a single month, made up largely of Chinese labourers, Prussian Jews, and Irish paupers; that the ranks are being swelled by adventurers of every land—the Communist of France, the Socialist of Germany, the Nihilist of Prussia, and the cut-throat murderer of Ireland—that all these persons may become citizens within five years, and most of them voters as soon as they have declared their intentions to become citizens, we may well hesitate about welcoming the late untutored savages into the ranks of citizenship."

The Dawes bill is criticised; and the conclusion reached that the time is not yet ripe to confer upon Indians the full rights of citizens.

Combinations to Stifle or diminish Competition from the Standpoint of Public Policy, by ELISHA GREENHOOD. The learned writer first treats of such combinations at public sales and private sales, and then in relation to public contracts; the conclusions reached are then summarized.

Exchange By-Laws, in their Relation to Option Dealing, by EDWARD C. ELIOT. How is an "Option Deal" as this is carried out on the floors of Stock and Produce Exchanges, to be distinguished from a legitimate contract? The test is the intention of the parties, which is generally a question of fact. After examining the charters of some of the more important Exchanges, and the by-laws passed by these bodies, it is sought to show that the latter are, many of them, *ultra vires*, and others are void as opposed to public policy, or the general law of the country. The absolute rights of an Exchange to expel, without appeal, a member, for infraction of a by-law is incidentally considered. "In

view of the facts and law it may be stated :—1st. That wagering contracts, or option deals, as a subject matter for the favouring action of the Exchanges, are not comprehended within their charter powers. 2nd. That by far the largest part of the business transactions of members of these bodies, at the present time, are, as a matter of fact, of this nature. 3rd. That this state of affairs is made possible by certain of the rules and by-laws of the Exchanges, and the mass of illegitimate trade is by them sustained."

Legislation upon the subject heretofore is admitted by the learned writer to have, in the main, proved a failure. He advocates renewed and more perfect legislation, with a recourse to *quo warranto*, when that remedy is applicable.

A Fragment of an unpublished Code of Evidence. This is a portion of a code of evidence prepared and reported to the Legislature of New York, by the Practice Commission. It has not yet been enacted as law. The principal member of the Commission was Mr. David Dudley Field. The numerous annotations to the various articles were supplied by Mr. Charles D. Baker.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

CHATHAM v. DOVER.

Municipality—Drainage—Petition for—Extending into adjoining municipality—Report of Engineer—Not defining proposed termini—Benefit to lands in adjoining municipality—Assessment on adjoining municipality.

Under the drainage clauses of the Municipal Act, a by-law was passed by the township of Chatham, founded on the report, plans and specifications of a surveyor, made with a view to the drainage of certain lands in that township; the by-law, after setting out the fact of a petition for such work having been signed by a majority of the ratepayers of the township to be benefitted by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost, as for benefit to be derived by the said lots and roads therefor. The township of Dover appealed from this report, under sec. 582 of 46 Vict. cap. 18, on the grounds, *inter alia*, that a majority of the property owners to be benefitted by the proposed drainage works had not petitioned for the construction of such work, as required by the statute; that no proper reports, plans

specifications, assessments and estimates of said proposed work had been made and served as required by law ; that the Council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by-law ; that the report did not specify any facts to show that the Council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover for any part of the cost of the proposed work ; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work, and that no assessment whatever should be made on the lands or roads in Dover, as the work would, in fact, be an injury thereto ; and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefitted.

Three arbitrators were appointed under the provisions of the Act, and at their last meeting they all agreed that the township of Dover would be benefitted by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line. W. D., another of the arbitrators, held that while the bulk sum assessed was not too great, the assessment on the respective lands and roads and parts thereof should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award "if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line, made by the surveyor, should be sustained and confirmed, and that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained. The Queen's Bench Division set aside this award (5 Ont. R. 325) on two grounds, namely, want of concurring minds in the arbitrators, and defect in the surveyor's report in not showing specifically the beginning and end of the work. The judgment of the Queen's Bench Division was sustained by the Court of Appeal (11 App. R. 248). On appeal to the Supreme Court of Canada,

Held, Ritchie, C. J., dissenting, that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefitted thereby, so as to give to the Corporation of Chatham jurisdiction to enter the township of Dover and do any work therein ; that the arbitrators should have adjudicated upon the merits of the appeal against the several assessments on the lots and roads assessed, as their award was, by sections 400 and 403 of 46 Vict. cap. 18, made final, subject to appeal only to the High Court of Justice, and it was not a matter for the Court of Revision to deal with at all as held by one of the arbitrators ; that the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did, in point of fact, charge every one of the lots and roads so assessed with the precise amount assessed upon them respec-

tively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be^{to} submit that to the Court of Revision ; that the arbitrators should have allowed the appeal to them against the surveyor's assessment, and that the award should have been set aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover which were assessed would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own which were not sufficient under the statute and did not warrant their being assessed.

Pegley, for the appellants.

Robinson, Q.C., and *Matthew Wilson*, for the respondents.

JOHNSON v. CROSSON.

Trespass to land—Conflicting titles—Description of locus in quo—Boundaries.

An action was brought in the Chancery Division of the High Court of Justice for Ontario to restrain the defendant from trespassing on the lands claimed by the plaintiff, and for damages for trespass already committed. The lands in question were described in the statement of claim as being in concession C, in the township of Etobicoke, and the defendant, in his statement of defence, denied the plaintiff's right to the possession of said lands, and claimed himself to be the owner in fee of the same ; he also claimed that the lands in question were not in concession C, but were parts of certain lots in concession B, in said township. On the hearing each party gave evidence of title in himself, the principal contention being as to the situation of the land, and judgment was given for the plaintiff.

Held, reversing the judgment of the Court below, that the title was in the defendant, under the evidence produced at the hearing, and that he was therefore entitled to have judgment entered for him, with costs of defence.

Held, also, that the said lands were in concession B, and not in concession C, as claimed by the plaintiff.

Robinson, Q.C., and *Reeve, Q.C.*, for the appellant.

Osler, Q.C., for the respondent.

NOVA SCOTIA.]

KEARNEY v. CREELMAN.

Will—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale under decree—Assignment of mortgage—Statute confirming title.

A. M. died in 1838, and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the real estate which were subsequently foreclosed, but no sale was made under the decree in such suit. In 1841, the mortgage and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. S., who, in 1849, assigned and released the same to M. M. In 1841, M. M., the administrator with the will annexed of A. M., filed a bill in Chancery for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor-in-Council, under a statute of the Province, for leave to sell the same, which was refused on the ground that such leave could not be given to sell a particular part of the real estate, and if the whole estate was sold and there should be a surplus, there was no way of apportioning such surplus among the devisees. A decree was made in this suit and the lands sold, M. M. becoming the purchaser. She afterwards conveyed said lands to the Commissioners of the Lunatic Asylum, and the title therein passed, by various Acts of the Legislature of Nova Scotia, to the present defendants, a statute having been passed in 1874, confirming the title to the lands in the Commissioner of Public Works and Mines. M. K., devisee under the will of A. M., brought an action of ejectment against the Commissioner of Public Works and Mines and the resident physician of the Lunatic Asylum, which was built on the lands, and in the course of the trial contended that the sale under the decree in the chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor-in-Council. The validity of the mortgages and of the proceedings in the foreclosure suit were also attacked. The action was tried before a Judge without a jury, and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb. On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court below, that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, and the plaintiff, therefore, could not recover in an action of ejectment.

Semble, that such sale was not invalid, but passed a good title, Henry, J., *dubitante*.

Held, also, that the statute, R. S. 4th series, cap. 36, sec. 47, vested the lands in the defendants if they had not a title to the same before, Henry, J., *dubitante*.

Wallace, for the appellants.

MacLennan, Q.C., and *Graham*, Q.C., for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., 11TH MAY, 1886.]

REGINA v. McNICOL.

By-law for licensing hawkers and petty chapmen—Agent for person residing out of county—Accused compelled to testify—Intent to evade by-law—Quashing conviction—48 Vict. cap. 40 (O).

Under a by-law of the County of Bruce, passed in pursuance of sec. 495 of the Con. Mun. Act, 1883, the defendant was convicted for selling and delivering teas as the agent of one P. W., of the city of London, contrary to the said by-law. The third section of the by-law was a copy of sec. 1 of 48 Vict. cap. 40 (O).

It appeared from the evidence of the defendant himself, who was called for the prosecution (the objection of his solicitor to his being made a witness being overruled) that he bought the tea of one W., of the city of London, and was not the agent of W. in the sale. The defendant formerly had sold tea on commission for W., but now purchased, as he said, to evade the by-law. The conviction alleged that the defendant was the agent of P. W. "of the city of London," but did not allege that the defendant had not the necessary license to entitle him to do the act complained of.

Held, that, inasmuch as the defendant was, according to the evidence, an independent trader, and not an agent, he did not come within the provisions of Con. Mun. Act, 1883, sec. 495, sub.-sec. 3, nor within 48 Vict. cap. 40 (O).

Held, also, that the conviction was insufficient, in not stating that P. W. was "not resident within the county," and that the expression "of the city of London" was insufficient.

Held, also, that it was improper to compel the defendant to give evidence against himself.

Held, also, that the possession of a license is a matter of defence, and the want of it is not a matter of proof for the prosecution.

Held, also, that the intention to evade the by-law was immaterial, so long as the agency did not in fact exist.

W. H. P. Clement, for the motion.

H. J. Scott, Q.C., contra.

[GALT, J.]

REGINA v. McCARTHY.

Amending conviction—Plea of guilty to defective information.

A magistrate may amend his conviction before the return of a *certiorari*, and the Court refused to quash on the ground of a previously returned conviction which was had, especially as this had not been filed.

The objection that the defendant has pleaded guilty to a defective information is, under 32-33 Vict. cap. 31, sec. 5 (D), inadmissible.

H. J. Scott, Q.C., for the motion.

Aylesworth, contra.

COMMON PLEAS DIVISION.

COSTELLO v. HUNTER.

Husband and wife—Breach of promise of marriage—Corroborative evidence—Statute of limitations.

In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but that when that time arrived he excused his doing so because, he said, he had not his house built, and he would not marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he then said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another woman, and this action was brought. The defendant denied the promise. In his examination before the trial he admitted visiting the plaintiff, and of talking to her of marriage, but he said it was not of their marriage but that of other persons; that when he visited her she was alone and he kissed her. In corroboration of the plaintiff's evidence a witness stated that in the fall of 1882 he had a conversation with the plaintiff, who, referring to some girls who visited his house, said he was not going to marry those who wanted his home, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "Yes." The witness stated that in the next spring or the one following after that, he had a further conversation with defendant when defendant said he was either going to rent or sell his house or get married, when witness said that he supposed plaintiff and defendant would soon make a match, to which the defendant made no reply.

Held, that the action was not maintainable.

Per Cameron, C.J. The promise stated by the plaintiff was sufficiently corroborated; but the action was barred by the statute of limitations.

Per Galt, J. Without expressing any dissent from the opinion of Cameron, C.J., on the statute of limitations, the plaintiff's evidence was not sufficiently corroborated.

Per Rose, J. The action was barred by the statute of limitations.

ARDAGH v. THE CORPORATION OF THE CITY OF TORONTO.

Contract—Written certificates—Necessity for—Final certificate.

The plaintiff entered into a contract with the defendants to construct a cedar block roadway, etc., according to plans and specifications and to the directions and satisfaction of the city engineer. Payments to be made monthly at the rates mentioned in the tender during the progress of the work upon the engineer's certificate and that of the chairman of the committee according to the provisions of the by-law No. 1107 relative to corporation contracts, which was incorporated with the contract. No money was to become due or payable on the contract until such certificate was granted, and a drawback of 15 per cent. of the amount appearing by any contract to be due, was to be detained by the corporation for six months from the date of the final certificate showing the satisfactory completion of the work. The provisions of the by-law were that no contractor, etc., should be paid the compensation allowed him (unless otherwise provided by the contract) or any part thereof, unless at the time of paying the same he should present to the treasurer a certificate from the engineer, etc., stating that he had examined, measured, and computed the work, and that the same was completed, or that the payment demanded was due on such work; and also stating what the work was on which such money was due. Also, that every account before being paid should be certified by the city engineer, and by the committee under whose authority the work was done; and that the treasurer should not pay such accounts unless furnished with the two certificates. By the specifications, the engineer was to be the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor; that monthly payments up to 85 per cent. of the work done should be made in the first week of the following month on the measurement of the engineer, such certificates to be binding only as progress certificates, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up and at the expiration of six months, when a certificate for the balance should be issued by the engineer. In an action to recover an alleged balance due under the contract,

Held, that to entitle the plaintiff to recover the amount due under the contract on the completion of the work, he must produce a written

certificate thereof, and that an oral certificate was not sufficient ; and the evidence set out in the case showed that no final certificate, as required, had been issued.

Lount, Q.C., and Pearson, for the plaintiff.

Robinson, Q.C., and J. B. Clarke, for the defendants.

SCOUGALL v. STAPLETON.

Malicious prosecution—Evidence—Taking legal advice stating whole facts—Magistrate consulting County Attorney—Admissibility of evidence—Judge's charge—Depositions.

In an action for malicious prosecution, it appeared that plaintiff's father sold a buggy to B. for \$115, to be made in two payments of \$58 and \$57 respectively, and until paid, the title and right of property were to remain to vendor. Before the purchase money was paid, B. sold the buggy to defendant, a livery-stable keeper. The plaintiff's father on hearing of this directed the plaintiff to go and take it from defendant, which plaintiff did, informing those at defendant's place that plaintiff could be seen at a hotel he named. The defendant on his return went and saw the plaintiff, when the plaintiff told him that he was acting under instructions from his father, who claimed to be the owner of the buggy, but notwithstanding this, defendant caused plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that plaintiff did not give a full and true account of the case. The jury found for the plaintiff.

Held, on the evidence the verdict would not be interfered with.

Evidence was offered that the magistrate, against whom there was no charge, had before acting consulted the county attorney, which was rejected.

Held, that the rejection was proper.

An objection was taken to the Judge's charge as being adverse ; but *Held*, not tenable.

At the close of the defence the plaintiff's counsel, without objection, put in the defendant's deposition before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof ; and the learned Judge in his charge read other portions.

Held, there would be no objection to the learned judge reading such other portions, if any was properly in evidence.

W. Nesbitt, for the plaintiff.

G. T. Blackstock, contra.

PALMBY v. McCLEARY.

Seduction—Evidence—Excessive damages.

In an action of seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant. The plaintiff stated that the defendant admitted he had seduced the girl and asked what the case could be settled for, when plaintiff said \$500. The defendant denied that he was the father of the child and that he had made any such admission, but admitted having asked what the case could be settled for, but did so out of curiosity. The jury found for the plaintiff with \$750 damages.

Held, that there was sufficient evidence to go to the jury; and that the damages, under the circumstances, were not excessive.

VANMORE v. FAREWELL.

Surgeon—Malpractice—Evidence—Interfering with jury—Rejection of evidence.

Action against a medical man for malpractice. The alleged malpractice consisted in applying what was called the primary bandage; and if this was good surgery, that it was applied too tightly and allowed to remain too long, whereby the arm sloughed, etc. The jury found for the defendant.

Held, on the evidence the verdict could not be interfered with.

A medical man called by the defendant stated that from the evidence given by the defendant and the evidence throughout the case, he could not say that the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to show that from what defendant stated at the trial the treatment was bad surgery.

Held, inadmissible.

The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give defendant the benefit of any doubt.

Held, not sufficient to justify the Court in interfering with the verdict.

POLSON v. DEGEER.

Hire and sale receipt—Property passing—Engine and boiler—Illegal detention.

The engine, boiler and other machinery were shipped to the defendant E. under a written order to ship same to his address as per price agreed on, viz., \$875, \$225 to be allowed for E.'s portable engine and boiler, and \$635 to be paid on shipment; but if not settled for in cash or notes within twenty days, then whole amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure and on demand he was to assign the policy to the plaintiff; and the title to the machinery was not to pass out of plaintiff, E. agreeing not to sell or remove same without the plaintiff's consent in writing. On default of payment, the plaintiff could enter and take machinery and E. agreed to deliver same to plaintiff in like good order and condition as he received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased by defendant D. to E.'s wife for one year from 11th March, 1881, and which premises D. agreed to sell to E. E's wife died on 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed dated 27th April, 1885, remised and released to D. all the right, title, and interest in the premises, as well of himself, as also as executor, together with the mill built thereon, with the boiler and engine and all fixed and moveable machinery; and on the same day D. leased the said premises, mill and machinery to E. for one year. After the execution of this lease, D. mortgaged the land, mill and machinery, to the defendants the F. Loan Society. The defendant E. never paid any cash, but gave his promissory note at three months, which was renewed from time to time, but ultimately E., having failed to pay same, the plaintiff demanded the machinery, when D. notified plaintiff not to remove the same, as also did the society. In an action against E., D. and the F. Society,

Held, that the effect of the transaction was that the property in the machinery was in the plaintiff and that he was entitled thereto: and that there was an illegal detention by defendants amounting to a conversion; and that unless the defendants allowed the plaintiff to remove the machinery, the plaintiff was to recover \$650 with interest.

· ROAN v. KRONSTEIN.

Lease for life—Statute of Limitations.

In ejectment, the following agreement was proved:—"It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry street by Mr. B. is correct; but that

the said Mrs. H. be permitted to occupy her house during her life and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R., but that after the death of the said Mrs. H. said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in rear of the said house.

Held, that the agreement must be construed as a demise or grant to Mrs. H. for life of that portion of the lot 12 covered by the house, and not merely a licence to occupy same, so that the right of entry thereto of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death. and therefore plaintiff having brought his action within 10 years of Mrs. H.'s death was not barred by the Statute of Limitations.

Carscallen, for the plaintiff.

Robertson, Q.C., for the defendant.

CHANCERY DIVISION.

[BOYD, C., 13TH MAY, 1886.]

MURPHY v. KINGSTON & PEMBROKE RAILWAY.

Railways and railway companies—Deviation—One mile limit.

Held, that upon a proper construction of 42 Vict. cap. 9, sec. 8, subsec. 11, being the Consolidated Railway Act of 1879, the limits of deviation of a railway must not exceed one mile from the line of the railway in case of lands, as shown on the plans and books of reference, or of alterations thereof; but even within one mile from the line no deviation shall be permitted except in such instances as are provided for in the special Act; and where, as in this case, the special Acts relating to a railway make no provision for deviation, they have no right to appropriate land not shown on their plans and books of reference, even though within one mile from their line, as shown on the plans and books of reference.

Black, for the plaintiff.

A. J. Cattnach, for the defendants.

[12TH JUNE, 1886.]

GEMMILL v. GARLAND.

Copyright—Notice of entry—38 Vict. cap. 88, secs. 9, 17.

The writer of a book printed the book which he intended to copyright with notice thereon of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, how-

ever, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. It appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete.

Held, that this did not constitute an infringement of sec. 17 of the Act respecting copyrights, 38 Vict. cap. 88.

On the title page of the book as published the plaintiff caused these words to be printed, "Entered according to Act of Parliament, in the year 1883, by J. A. Gemmill, in the office of the Minister of Agriculture, at Ottawa."

Held, that this was a sufficient compliance with sec. 9 of the Act, although the form of words used was not exactly the same as there prescribed, the variation being immaterial.

Christie, for the plaintiff.

W. Cassels, Q.C., for the defendant.

[PROUDFOOT, J., 28TH APRIL, 1886.]

PLATT v. G. T. RAILWAY CO.

Covenant for quiet enjoyment—Covenant for title—Breach—Damages—Set off of arbitration damages—Different causes of action—Mortgagees—Parties.

On 3rd February, 1873, the defendant company granted to A. T. P. (through whom S.P., the original plaintiff in this action claimed) a certain mill site on the river Maitland with certain easements, one of which was the right to erect a dam across the river high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted (without reserving any of the easements granted to A. T. P.) an island in the river called Island C, and two parcels of land, one on each bank, immediately opposite to each other, and adjoining the property of the plaintiff, called respectively the "Great Meadow" and "Block F," all three of which were above the land granted to A. T. P. and subsequently became the property of H. Y. A.

In an action by T. P., who died after action brought, when M. A. P. was made plaintiff by order of revivor against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river without submerging a great part, if not the whole of "Island C," and penning back water and ice on "The Great Meadow" and "Block F," and encroaching upon the rights of H. Y. A. as riparian proprietor to the lands.

It was contended on the part of the defendants that the mortgagees of the property should be made parties.

Held, that the Judicature Act, sec. 17, sub-sec. 5, enables a mortgagor entitled to the possession of land as to which the mortgagee has given no notice of his intention to take possession, to sue, to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail.

Held, also, that in an action on a covenant for quiet enjoyment, a plaintiff must show an interruption or obstruction of the easement in order to entitle him to recover, and that T. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and not having been interrupted, he could not succeed on the covenant for quiet enjoyment.

Held, also, as to the covenant for title that as the Supreme Court had decided in *Platt v. Attrill*, 10 S. C. R. 425, that the company had no right to grant the easement to A. T. P., that decision was binding upon him, although the company were not parties to the suit, and that the covenant was broken as soon as it was made and the plaintiff entitled to such damages as accrued during the life of T. P., and, following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the value of the estate that had passed and that which the deed purported to convey and the company covenanted they had the right to convey.

It appeared that during T. P.'s ownership the Government had constructed a breakwater at the mouth of the river, and that T. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater and forcing them back on T. P.'s property," and on another account not material to this action.

Held, that as the sum awarded was a lump sum for both accounts together and as the evidence on the arbitration showed that the breakwater only affected T. P. to the extent of 3 feet of water, leaving him a fall of 5 feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the Government against their liability for damages for their breach of contract.

Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant.

The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed.

MacLennan, Q.C., and *M. G. Cameron*, for the plaintiff.

S. H. Blake, Q.C., *Cassels, Q.C.*, and *Garrow, Q.C.*, for the defendants.

[16TH JUNE, 1886.]

FOSTER v. RUSSELL.

Contract for security for advances—Specific performance—Uncertainty—Security.

One F., a book-keeper and accountant, entered into the following agreement with the firm of R. & Co. The agreement was in the form of a letter addressed to the plaintiff, and worded thus: "In consideration of your advancing us the sum of \$3,000, we agree to give you collateral security and to pay you interest on same at rate of eight per cent. per annum." The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of creditors. The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him.

Held, that the agreement was incapable of specific performance by the Court, for the reason that the terms were too vague and uncertain to be entertained. No kind of security was specified in the agreement, and parol evidence could not be given to supply the defect. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for the amount advanced, and interest and costs of action. *De Gear v. Smith*, 11 Gr. 570 followed.

WOOD v. ARMOUR.

Will—Construction—Intestacy—Blended fund—Distribution per capita.

A testator directed his executors to pay his debts, funeral expenses and legacies thereafter given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of my just debts and funeral expenses, and all my property and personal effects, money or chattels, are to be equally divided between my children and their heirs—that is the heirs of my son G. and daughter S., now deceased, and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age.

Held, (i) that there was no intestacy either of the real or personal estate. It is to be presumed that the testator did not intend to die intestate, and the language shows he did not intend his heirs to take his property as real estate, as he peremptorily directs a sale, makes an actual conversion of it into money, thus blending the real and personal property in a common fund, and then bequeathes it all to the legatees. (ii) That the persons entitled to share under the will took *per capita* and not *per*

stirpes, upon the same principle as in the case of *Abrey v. Newman*, 16 Bab. 431. Where the gift is to the children of several persons they take *per capita* and not *per stirpes*. (iii) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity.

W. R. Meredith, Q.C., for the plaintiff.

R. M. Meredith, for the executor and two grandchildren.

F. W. Harcourt, for the infants.

[17TH JUNE, 1886.]

In re BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

*Foreign company—Deposit with Minister of Finance—31 Vict. cap. 48 (D)—
34 Vict. cap. 9 (D)—Constitutional law.*

Canadian policy holders petitioned for distribution of the deposit made by the above company, a foreign corporation, with the Minister of Finance, under 31 Vict. cap. 48 (D) and 34 Vict. cap. 9 (D), the company being insolvent.

Held, that they were entitled to the relief asked notwithstanding that proceedings to wind up the company were pending before the English Courts; and that the above Acts were not *ultra vires* of the Dominion Parliament.

Moss, Q.C., and *J. T. Small*, for the petitioners.

James MacLennan, Q.C., and *Francis*, for the company.

[FERGUSON, J., 16TH APRIL, 1886.]

THE BUILDING & LOAN ASSOCIATION v. PALMER.

Fraudulent conveyance of chattels—Setting aside—Evidence of collusion or fraud—Judgment and execution creditors—48 Vict. cap. 26, ss. 2 and 3.

In an action by a creditor for an amount due on a mortgage and to set aside a conveyance of personal property, in which the judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, and that no collusion or fraud was proved, it was

Held, that as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the Statute of Elizabeth; and that although under 48 Vict. cap. 26, sec. 2 (O), it might possibly be that the transaction should be held to be void as against creditors as *having the effect* of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham or colourable one, but was a real transaction and *bona fide*, and a note was given as actual present consideration, on which defendant Ferguson was liable, and which he afterwards paid, section 3 applied and protected defendants, and the plaintiffs failed on that branch of the case.

Allan Cassels, for the plaintiffs.

Guthrie, Q.C., for the defendants the Palmers.

Moss, Q.C., for the defendant Ferguson.

[ROSE, J., 14TH MAY, 1886.]

MACDONALD v. ELLIOT.

Mortgage—Action on covenant—Statute of Limitations.

Action on covenant in a mortgage dated 13th October, 1866; writ issued 17th February, 1886. Defence, that the plaintiff's cause of action was barred by the Statute of Limitations, no interest on the principal money secured having been paid at any time.

Held, that the plaintiff was entitled to judgment. *Allan v. McTavish*, 2 App. R. 278, followed in preference to *Sutton v. Sutton*, 22 Ch. D. 511, and *Fearnside v. Flint*, 22 Ch. D. 579.

The covenant provided for payment of interest at nine per cent. up to the end of the year from the date of the mortgage, when the principal fell due.

Held, there being no evidence why such rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in the year 1866, and some following years, the same rate of interest should be allowed for the years subsequent to the expiry of the first year.

J. B. Jackson, for the plaintiff.

G. T. Blackstock and M. Walsh, for the defendant.

IN CHAMBERS.

[BOYD, C., 29TH JUNE, 1886.]

GEORGE T. SMITH CO. v. GREEY.

*Examination—Party resident out of jurisdiction—Conduct money—
Objections.*

The president of the plaintiff company lived in the United States, but being in Toronto he was there subpoenaed on the 22nd April to attend on the 28th April for examination for discovery before a Special Examiner at Toronto. He was paid \$1, and made no objection as to the amount nor did he object that he was prevented by engagements from being present on that day, but he failed to attend.

Held, that the president should have attended for examination on the day appointed, and that the fact that there were then pending against him at the instance of a stranger to this action proceedings for perjury which might affect some point in controversy in this action, though it might be a reason for his refusing to answer any questions on this point, was not a reason for his refusing to attend at all, and the president was ordered to attend for examination at Toronto at his own expense.

Arnoldi, for the plaintiffs.

H. D. Gamble, for the defendants.

[2ND JULY, 1886.]

In re PHILBRICK & O. & Q. R. CO.

*Railway Company—Award—Interest—Railway Act, 1879—Arbitrators' fees—
Summary order.*

An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879, and money was paid into the Bank under the same sub-section by the Company.

Held, that the land-owner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the Bank upon deposit and not at the legal rate of six per cent.

It was determined in this matter that neither party was entitled to the costs of arbitration under the statute, but the Company in order to take up the award paid the whole of the arbitration fees.

Held, that a summary order could not be made to recoup the Company for one half the fees out of the moneys payable to the land-owner, and such an order was refused, without prejudice to an action for the same purpose.

Alfred Hoskin, Q.C., for the landowner.

Geo. Tate Blackstock, for the Company.

[PROUDFOOT, J., 31ST MAY, 1886.]

WILKINS v. CLARKE.

Sale—Receipt of deposit by vendor's solicitor—Default in paying in—Distribution.

A partition action. The vendor's solicitor received the 10 per cent. deposit at the sale from the purchaser under conditions of sale, which read "to be paid to the vendor or his solicitor." The solicitor did not pay the deposit into Court, and an order was made striking him off the rolls for his default. On a motion for distribution,

Held, that the default of the solicitor was the default of his client, and that the deficiency must be charged against the plaintiff's share.

Watson, for the plaintiff.

Harcourt, for the infants.

[O'CONNOR, J., 28TH MAY, 1886.]

In re TAYLOR & O. & Q. R. CO.

Railway company—Award—Interest—Railway Act, 1879.

Money was paid into the bank under the Consolidated Railway Act, 1879, sec. 9, sub-section 28, and an order for immediate possession of lands expropriated by the Company was made by a judge under the same sub-section, and an award of compensation was subsequently made.

Held, that the land-owner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in, and not at the legal rate.

Leys, for the owner.

MacMurchy, for the company.

[THE MASTER IN CHAMBERS, 5TH MAY, 1886.]

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION
v. SHAW.

Copyright—Injunction—Damages.

The defendant in his affidavit on production of documents claimed privilege for invoices showing the number of copies imported into Canada by him of the several musical arrangements of the melody of the songs,

in respect of which the plaintiffs claimed, and sought to protect them as follows: "That the plaintiffs have brought another action against me in this Honourable Court, suing on behalf of themselves as well as on behalf of Her Majesty the Queen, seeking to recover from me the penalties and forfeitures imposed and provided by Section 13 of the Copyright Act of 1875, in respect to the same musical compositions as those mentioned in the statement of claim in this action, and that the said action is still pending, and that to produce such documents might tend to criminate me in said other action and to render me liable to the penalties sued for therein."

In the second action, in which the plaintiffs sued "on behalf of themselves as well as on behalf of Her Majesty," for the penalties under the above Act, the defendant in his affidavit on production of documents, claimed privilege for the same invoices and sought to protect them as follows: "That the production of said documents might tend to criminate me and render me liable to the penalties sued for herein."

Held, that the documents were properly and sufficiently protected from production.

Kappele, for the plaintiffs.

H. Cassels, for the defendant.

H.C.

MANITOBA.

IN THE QUEEN'S BENCH.

WILTON v. WILTON.

Foreclosure—Disclaimer—Costs.

A foreclosure bill alleged that the defendant Carruthers was the assignee of the equity of redemption, and was entitled to redeem. The defendant Carruthers filed the following disclaimer:—"I have not and do not claim and never had or claimed to have any right or interest in any of the matters in question in this suit, and I disclaim all right title and interest legal and equitable in any of the said matters, and I say if I had been applied to before the filing of this bill I should have disclaimed all such right title and interest and I submit that the bill ought to be dismissed as against me with costs." The cause was set down to be heard upon bill and answer.

Held, that the defendant Carruthers should pay the costs of the hearing.

ONTARIO BANK v. GIBSON.

Promissory note—Non-endorsation by co-surety—Pleading—Due notice.

Declaration that Drake and Rutherford by their promissory note now overdue, promised to pay to William Rutherford or order, \$5,000 one month after date at the Ontario Bank, Winnipeg, and the said William Rutherford endorsed the same to the defendant, who endorsed the same to Drake and Rutherford, who endorsed the same to the plaintiffs.

One plea alleged that one E. F. Rutherford, on behalf of a co-partnership firm of which he was a member, applied to the defendant and one William Rutherford to endorse, along with one Samuel Boyle as co-endorser the note sued upon for the accommodation of the said firm; and the defendant and the said William Rutherford consented to and did endorse the note for the accommodation of the said firm and not otherwise, and upon the terms and conditions that the said Samuel Boyle would join in endorsing said note as co-surety for the said firm with the defendant and said William Rutherford, and the said E. F. Rutherford received from the defendant and William Rutherford said note so endorsed by them upon the terms and conditions that he should not deliver the same to any person, or in any way use or negotiate the same unless and until the said Samuel Boyle should first endorse the same, but the said E. F. Rutherford did not procure the said Samuel Boyle to endorse the said note as aforesaid and he without authority delivered the same to the plaintiffs, and the plaintiffs received and discounted the same on account of the said firm without such endorsement of the said Samuel Boyle, of all which the plaintiffs had due notice.

There was another plea to the same effect, omitting the allegation of notice.

Held, upon demurrer to these pleas, (i) that the allegation of notice imported such notice as alone would constitute a good ground of defence—notice at the time the plaintiffs first received the note.

(ii) That even if the plaintiffs had no notice, yet they could not recover, the note never having been a completed instrument. *Arde v. Dixon*, 6 Ex. 869, followed.

ONTARIO BANK v. LEACOCK.

Costs on discharging a rule nisi which does not ask for costs.

A rule *nisi* to set aside a verdict for the plaintiff, and to enter a verdict for the defendant, did not ask for costs.

Held, nevertheless, that the rule might be made absolute with costs.

McARTHUR v. McMILLAN.

Promissory note—Indorsement—"Notes of mine"—Appropriation of payment.

A note payable to the defendant, and endorsed "Pay to the order of McA. B. & Co." (the plaintiffs) may be declared upon as endorsed by the defendant to the plaintiffs; although the name of another endorser appears below the defendant's signature—there being no explanation of the circumstance under which this other name was signed.

The phrase "*notes of mine*" is wide enough to cover notes *endorsed* as well as *made*.

The principle of appropriation of payment discussed.

Judgment of Taylor, J., 3 Man. L. R. 152, affirmed.

VEITCH v. McLENNAN.

Pleading—Allegation of completed contract.

A declaration was in the following form:—"And for that at the time of the making of the contract between the plaintiff and the defendant hereinafter mentioned, the defendant had a contract with the city of Winnipeg for the paving with blocks a certain portion of Main street in the said city, and in consideration that the plaintiff would have for the defendant all the blocks that would be required for paving the said portion of the said street from the place or places where the same should be delivered to the defendant by the person or persons from whom he might buy the same, to the place or places on the said street where the said blocks should be required for paving by the defendant, the defendant promised to allow and permit the plaintiff to haul all the said blocks and to pay him therefor the price or sum of fifty cents a cord; and the plaintiff entered on the said work pursuant to the said contract and hauled a portion of the said blocks and continued at the said work and was performing the same according to the said contract until the breach of the said promise hereinafter alleged, and the plaintiff was always ready and willing to haul the remaining portion of the said blocks according to the terms of the said contract, of which the defendant always had notice and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to haul the remaining portion of the said blocks and finish the said contract, yet the defendant refused to allow the plaintiff to haul the remaining portion of the said blocks, etc."

It was objected upon demurrer that the count disclosed only an unaccepted offer by the defendant to the plaintiff, and that it should have been alleged that the plaintiff promised to haul all the logs.

Held, reversing the judgment of Killam, J., that the count was sufficient.

RENEWICK v. BERRYMAN.

Mortgage suit—Ranking owners of parts of equity of redemption—Estoppel—Defective registration.

The usual mortgage decree, with a reference as to encumbrances, was made. Subsequently the Master made a report finding that the plaintiff and certain of the defendants had encumbrances upon the whole land. This was not appealed from. Afterwards an order was made referring it to the Master to inquire whether as between themselves any one or more of the defendants was, or were, entitled to be relieved from the payment of the plaintiff's mortgage and to fix the order of liability.

Held, that the defendants were estopped from denying the priority of the plaintiff's mortgage.

It is the duty of a vendor who has been paid in full to discharge any encumbrances on the land, and it is immaterial, as regards the application of this principle, whether the encumbrance was created by the vendor or resulted from the act of a prior owner. If, therefore, the encumbrance extends to other lands, those, and not the land conveyed, are the primary fund for its payment. *Pierce v. Canavan*, 7 App. R. 194, followed.

If those other lands are subsequently sold to another purchaser, they remain in his hands subject to the same liability.

The encumbrance—a mortgage—contained the following clause:—
“Provided further that the said mortgagee will release any portion of the lands hereby mortgaged on receiving a sum on account of the said principal money equivalent to, or in the ratio of fourteen hundred dollars per acre for the portion so released.” The area of the mortgaged premises was such that, computed at \$1,400 per acre, there would be more than sufficient to pay off the amount of the mortgage.

Held, that these circumstances would not vary the result. *Davis v. White*, 16 Gr., distinguished. If the deed to the second purchaser be registered before that to the first, the second is entitled to have the first purchaser's property first applied in satisfaction of the mortgage.

Registration is ineffectual if the addition or calling of the witness be not set forth on the affidavit of execution.

FRONTENAC LOAN CO. v. MORRICE.

Estoppel—Irregularities in collateral proceedings—Administration—Priority of judgment creditors.

The plaintiffs, in the life time of the deceased, J. M. McDonnell, recovered judgment against him and issued execution. The defendant, G. M. McDonnell, obtained an administration of his estate. Amongst the assets were two policies upon the life of the deceased. The administrator, for the purpose of preferring certain of the creditors, executed an assignment of these policies to the defendant Morrice, and the defendant Morrice gave to the administrator a power of attorney to receive the insurance moneys and distribute them according to the terms of the assignment. The plaintiffs, being unable to realize their debt, filed a bill claiming that the assignment was fraudulent and void as against them and asking that it should be set aside.

The defendants attacked the judgment upon various grounds, amongst others that the Court had no jurisdiction upon its equity side to make an order for payment by the intestate, they also objected that the judgment was not a docketed judgment and therefore not entitled to priority.

Held, by Wallbridge, C. J., (i) that the decree could not be attacked upon any grounds of irregularity not affecting the jurisdiction of the Court. (ii) That in the administration of assets a judgment obtained against the deceased is entitled to priority over simple contract and specialty creditors. (iii) And it is not essential to the judgment that it should have been docketed. The assignment, therefore, was set aside.

BROWN v. HARROWER.

Statute of Frauds—Executed contract—Parol evidence to contradict deed.

The Statute of Frauds does not apply to a contract for the sale of lands after execution of the conveyance.

The plaintiff sold lands to the husband of the defendant, who sold to the defendant. The agreements were not in writing. For convenience the plaintiff conveyed direct to the defendant. Upon a bill filed to establish a vendor's lien,

Held, that notwithstanding the statute the defendant could show by parol a purchase from her husband and to this extent contradict the deed.

BELL v. NORTHWOOD.

Specific performance—Shares—Certainty.

The defendant N. agreed with the plaintiff as follows : I hereby agree to sell to you 1850 shares in the Qu' Appelle Valley F. Co's stock for the sum of \$15,000, you to pay \$10,000 to the Bank of Commerce ; payment of the \$15,000 to be made as follows:—\$5,000 by endorsed note at four months ; \$5,000 by note at one year's date ; \$5,000 by note at two years' date at seven per cent ; the last named notes to be secured by a portion of the stock." The defendant N. had at this time 2,050 shares under pledge to the Bank of Commerce, and there was little doubt that the 1,850 shares agreed to be sold were understood to be portion of these 2,050. Almost immediately after making this agreement N. sold the shares to his co-defendant. Upon a bill for specific performance,

Held, (i) that the contract was too indefinite in not sufficiently showing what particular shares were to be sold, in leaving uncertain who was to endorse the notes, and in not providing what portion of the shares was to form the security for the notes ; (ii) parol evidence to explain any of these points or show the understanding of the parties would be inadmissible ; (iii) the shares could not be transferred without the sanction of the directors, and the Court will not direct a transfer where it has no power to enforce its complete execution.

McLENNAN v. THE CITY OF WINNIPEG.

Mechanics' lien—Date of completion of work.

Held, that when the completion of the work is alleged as of a particular day, which is a considerable time after the bulk of the work was performed, clear and satisfactory evidence must be given to enable the Court to find the date proved.

Held, upon the evidence in this case, that the date was not sufficiently proved.

Held, upon rehearing, that the evidence showed that the main work was not completed before the date alleged, and that although some leveling of the earth around the building was done upon the two succeeding days the plaintiff was entitled to his lien.

In a suit by a sub-contractor it is not necessary at the hearing to prove that there is anything due by the owner to the contractor. That is a matter for the master's office.

WICKSON v. PEARSON.

Vendor and purchaser—Limiting time for payment by notice—"Prowling assignee."

Three of the defendants agreed to purchase certain lots from the Hudson's Bay Co., one fifth to be paid in cash and the balance in instalments; time to be of the essence of the contract. These three defendants sold to Mrs. C., their co-defendant, who afterwards filed a bill to rescind the sale on the ground of fraud, and for a lien upon the land for her purchase money. Pending the litigation the plaintiff paid off the Hudson's Bay Co. and took a conveyance subject to the agreement. Shortly afterwards he filed a bill in the name of the Company against the same defendants for a rescission of the contract. This was dismissed because the Company had parted with its interest.

The plaintiff then gave the defendant notice to pay in three weeks, and in default that he would rescind. Payment not having been made upon the date fixed, this bill was filed to declare the contract rescinded, and that the various documents might be declared to be clouds upon the plaintiff's title.

Held, (i) that the time given for redemption was reasonable, and that the defendant Mrs. C. was not now entitled to redeem.

(ii) Upon the evidence, that the plaintiff was not disentitled to relief as being a "prowling assignee."

THE CANADIAN LAW TIMES.

VOL. VI.

AUGUST, 1886.

No. 10.

ONTARIO LEGISLATION, 1886.

TAXATION of *Algoma Lands—Exemptions.*—By chapter 6 of the Acts of last session, section 3 (1), “all lands within the Provisional Judicial Districts of Algoma and Thunder Bay, which are occupied as farming lands and *bona fide* used for farm purposes, shall be exempt from the said tax”—a tax of one cent per acre. A similar Act was passed by the Legislature of Manitoba and was held by Chief Justice Wood to be invalid by reason of its discrimination. In *Hudson Bay Co. v. Attorney-General* (a), His Lordship says, “The exemption of 640 acres of land to residents is open to observation. Looked at in the light that all lands are to be taxed on an equal and uniform scale, basis or rule, even and universal in its application to the acreage of land, it is, I must confess, a little difficult on principle to justify this exemption. If every owner of lands were resident in the Province, the rule of equality and uniformity would not be violated; for all would be exempted alike. But the fact is, and was well known to the Legislature, that a large number of land owners were non-residents; and, as the proposition of the Legislature is to tax lands, not individuals, the result is that one person, because he happens to be a resident of Manitoba,

(a) Man. Rep. temp. Wood, at p. 220.

although he owns 640 acres of land, is not taxed at all, while another person who owns 640 acres, but who happens to reside in Ontario or elsewhere out of Manitoba is taxed five cents an acre. This discrimination is irreconcilable with the plainest principles applicable to the exercise of the legislative powers of taxation by any enlightened and responsible Legislature, and affects injuriously, unjustly, and inequitably every non-resident land owner in Manitoba.

* * It was simply monstrous, while the property is, as a whole, treated as of one uniform value in the system of taxation proposed, to divide the owners into classes, and tax the property of the one class at one rate and that of another at a different rate, not on account of the difference in value, but simply because one owner happens to reside in the Province, and another without the Province, one in one latitude and meridian, and another in another latitude and meridian. In a legal and constitutional point of view, it would be just as sensible to make the discrimination rest upon the nationality, the age or the colour of the owner, as on his residence or non-residence in Manitoba."

In the same spirit is the decision of Mr. Justice Crease of British Columbia (b), who held the "Chinese Regulation Act, 1884," to be invalid on several grounds, one of which was that it imposed a poll tax upon every Chinese and was therefore unequal in its operation.

The defence of the Act in question undoubtedly is—that the Legislature desires to encourage farming and the influx of a farming population. But we know of no sound reason for directly throwing the expense of public or municipal government upon one or more classes in order to benefit another class. Of a similar indefensible nature is the exemption from taxation of, and granting of bonuses to, manufacturers, who have no other inducement to commence business than the terms so offered to them.

Division Courts.—As usual, *The Division Courts Act* is largely amended. The jurisdiction is extended by section 6 of chapter 15 of the Acts of last session, by allowing a

(b) 2 B. C. L. R. 150.

combination of causes of action in tort with causes of action in contract, provided that the sum of \$100 in the aggregate is not exceeded. A cause or causes of action under the jurisdiction limited to \$60 (called class (a)) may be combined with a cause or causes of action under the jurisdiction limited to \$100 (called class (b)), and they may be disposed of in one action on two conditions. The first condition is that "the whole amount claimed in any such action in respect of class (a) shall not exceed \$60. That is, as we understand it, that a plaintiff may sue for as many causes of action in tort as he pleases, as long as the amounts claimed do not aggregate more than \$60. The second condition is that the whole amount claimed in the action in respect of both classes (a) and (b) shall not exceed \$100. If the action in tort, then, is for an amount equal to \$60 the jurisdiction of the court is limited in contract to the amount of \$40. The very peculiar proviso is added that in such an action, if nothing is claimed for tort the jurisdiction is limited to \$100. The Act in this respect reads as follows:—(4) "claims combining [classes (a) and (b)] may be tried and disposed of in one action * * provided that the whole amount claimed in any such action * * in respect to class (b) *where no claim is made in respect of class (a)* shall not exceed \$100." This is equivalent to saying that where a plaintiff sues in respect of a claim on which the Court has jurisdiction up to \$100 the amount claimed shall not exceed \$100.

The finding of the Court upon claims so joined is to be separate. That being the case it is difficult to see why the jurisdiction was not extended to \$60 in respect of tort *and* \$100 in respect of contract, making in all \$160. The separate findings in such a case would be equivalent to trying separate actions, one immediately after the other. The only difference under the amendment in question is that both are endorsed upon one summons. The effect is to give the place of honour, so to speak, to that part of the action which relates to tort, the jurisdiction as to the balance of the amount claimed being entirely dependent upon the amount claimed for the tort.

In *Meek v. Scobell* (c), the plaintiff joined a claim in tort of \$69.33 with a claim on contract which made the total more than \$100. Prohibition was ordered because the abandonment at the trial of enough to bring the claim under \$100 was general and not in respect of the claim in tort, the Court holding that the abandonment should have been specifically as to the claim for damages so as to reduce it to the limit of Division Court jurisdiction. The whole case proceeds upon the assumption, though that was not decided, that the two claims might have been properly joined, provided that the amount claimed in tort did not exceed \$60, and that the aggregate did not exceed \$100. If, however, there was any doubt upon it before, the new Act makes the law plain.

In *Re Drinkwater v. Clarridge* (d), it was held that a plaintiff who sued upon a promissory note or other negotiable instrument, and specially endorsed his summons therefor, was entitled to have judgment entered for the amount of his claim without filing the instrument, in case the defendant did not appear. It was traditionary with some clerks, and with the clerk of the County Court of the County of York, that the plaintiff must file the instrument; and various were the reasons given. The matter had previously been decided on a motion to compel the County Court Clerk aforesaid to sign judgment on a special endorsement. The Division Court Clerks, however, had still to be educated up to the refinements of High Court law, and so *Drinkwater's* case came up on a motion to compel the clerk to sign judgment. The Legislature being wiser than the Courts have now enacted (chapter 15, section 7) as follows:—"In any action brought to recover a sum of money due on any promissory note or notes, such note or notes shall be filed with the clerk before judgment unless otherwise ordered, or unless the loss of the note be shown, or that it cannot for some other satisfactory reason be produced." The law as to bills of exchange and other negotiable instruments, we presume,

remains as before this enactment, as promissory notes only are mentioned.

By section 9 of the same Act subpoenas are now to run into the whole Province. By the old law they issued only for witnesses found within the county; and application had to be made to a Superior Court for a subpoena to a witness without the county. The clause which allowed subpoenas to issue from the Superior Courts for witnesses out of the county is now repealed.

By section 125 of *The Division Courts Act* no debt due to a mechanic, etc., shall be liable to attachment unless it exceeds the sum of \$25, and then only to the extent of such excess. By 47 Vict. cap. 9, sec. 1, this is not to apply to any case where the debt has been contracted for board or lodging, and in the opinion of the Judge, the exemption is not necessary for the support and maintenance of the debtor's family. Chapter 15, section 11, of the Acts of last session enacts that in all cases where the debt sought to be garnished is for wages or salary, there is to be served with the summons upon the garnishee a memorandum showing amongst other things whether the debt alleged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging, and in the absence of such a memorandum respecting the nature of the debt, it may be presumed by the garnishee not to have been incurred for board and lodging.

Provision is also made in garnishee proceedings for a species of pleading by filing notices of defences and admissions to save the expense of attending at the trial.

By sections 18 and 19 of the same Act provision is made for taking the evidence of (i) persons who are sick, aged or infirm, (ii) persons about to leave the Province, (iii) witnesses who reside in a remote part of the Province and at a great distance from the place of trial whose attendance cannot be procured, or where the expense of procuring their attendance would be out of proportion to the amount involved in the action. And the following section allows a defendant to withdraw his defence and allow judgment to go.

Parties may now be added as plaintiffs or defendants at any time after the action is commenced, and service may be dispensed with by the Judge if the party is added at the trial. The power previously existed to substitute a witness for a defendant originally sued, on its appearing that the witness was really the debtor and should have been sued instead of the original defendant (e).

The practice in suing partners receives some attention. It has been customary to sue in the name of a partnership firm instead of in the names of individual partners, though there is no authority for it in *The Division Courts Act*. Sections 77 and 78 of that Act refer to the manner in which partners may be sued. Under those sections, in actions against partners or persons jointly liable, one or more may be served, *if the others cannot be found*, and judgment and execution may be obtained against the persons served, and if it appears that the demand was a partnership transaction, the goods of the partnership may be seized.

By section 21, sub-sections 4, 5 and 6 of chapter 15 of the Act of last Session (i) plaintiffs and defendants may sue and be sued in the partnership names; (ii) service on one partner is good service on the firm; (iii) the Judge may order the names of the partners not served to be furnished; (iv) upon judgment being granted against the firm execution may issue (a) against the goods of the partners, (b) or any one who has admitted in the defence that he is a partner, or has been adjudged a partner, (c) any person who has been served as a partner and does not appear; (v) by adding the individual partners not served under the preceding section, judgment may be obtained against them with the usual consequences. This new enactment apparently is not intended to supersede the old one, which is operative only when one or more of the persons jointly liable cannot be found. It also applies to claims against persons jointly liable as well as against partners in trade.

(e) *Re Henney v. Scott*, 8 P. R. 251.

Amendment of the law.—Chapter 16 of the Acts of last Session is an Omnibus Act, and is said to be for further improving the law. Amongst many other amendments, the examination of married women in settled estates cases is rendered unnecessary unless expressly directed by the court or a judge; provision is made for serving the official guardian for infants and persons of unsound mind (not so found) in applications to the High Court; money realized from the sale of settled estates is to be invested as the court or judge may direct; special examiners of the High Court are to be special examiners of County Courts.

The law as to examination of judgment debtors undergoes a radical change by the extension of the power to examine to (i) any clerk or employee, (ii) any former clerk or employee of the judgment debtor, or (iii) any person to whom the debtor has made a transfer of his property or effects since the date when the debt or liability was incurred for which judgment was obtained. The power to examine *any former clerk or employee* of the judgment debtor apparently gives unlimited scope to the creditor to go back any length of time and examine all the clerks and employees of the debtor in succession; but it is in the same spirit with the principle of the law in allowing an examination as interpreted in *Ontario Bank v. Mitchell* (f). In that case it was held that the examination of a judgment debtor is not to be confined to an examination during the period following the contracting of the debt, but may extend as far back as the creditor chooses to press the examination. The examination under the amending Act is to be used for discovery only. The right to examine those persons who have taken conveyances of the debtor's property will be found to be a most useful one. And the exercise of the right in many cases will no doubt enable the creditor to fasten upon something of more value than the debtor's body.

Crown administrations.—The Act respecting the administration by the Crown of the estates of intestates who die without any known relatives, permits an application to be

(f) 32 C. P. 73.

made by the Attorney General, where letters of administration have been taken out by him, for an enquiry as to whether Her Majesty is entitled to any portion of the real or personal estate of the intestate. By section 14 of the Omnibus Act a clause is added permitting an application as to realty only; and apparently this may be done without letters of administration having been first issued. Keeping in view the very important Act respecting the devolution of estates of persons dying after the first of July of this year the significance of this enactment is not clear. The fourth section of the *Devolution of Estates Act* declares that the real property of any person dying after the first of July shall "devolve upon and become vested in his legal personal representatives from time to time." And by section 9 the legal personal representatives "shall have power to dispose of and otherwise deal with all real property * * as if the same were personal property." The Attorney General on receiving letters of administration would by virtue of the latter Act immediately become entitled to the realty. Sub-section 2 of the amending Act allows the Attorney General to bring an action for realty to which he claims the Crown to be entitled, and he is to be entitled to recover possession unless the person claiming adversely shows (i) that the deceased did not die intestate, or (ii) *that he left heirs*, or (iii) that some other person is entitled to the realty. What would be the result if the person claiming adversely showed that the deceased left no heirs, but that a creditor had taken out letters of administration, and claimed the realty under the devolution of estates Act? Heirs do not now take realty by descent. It devolves upon the personal representative. The general words which have been tacked on the section, "or that some other person is entitled to said real estate," just save the amendment from being ridiculous, though it is manifest from a perusal of the section that those words were not added on account of the change made in the law of descent.

Protection of State papers in evidence.—A clause is added to *The Evidence Act* by section 16 of chapter 16 of the

Act of last session, which permits a deputy head or other officer of a department who has documents in his personal possession which are in the official custody of the Head of a Department or a member of the Executive Council, to object to produce them on the ground that they are privileged. This enactment seems to us to be unnecessary. It is not the privilege of the witness that protects State papers, but public policy; and it seems to us to make no difference that for the moment the papers happen to be in the personal possession of a subordinate officer. State papers must necessarily be distributed amongst subordinates, and it would be an absurd conclusion that although one could not subpoena the Head of the Department to produce the documents, he might subpoena a subordinate who for a moment happened to have the papers in his personal possession. If the new legislation is founded on any such interpretation of the law it is entirely misconceived. In *Bradley v. McIntosh* (g) it was held that the question whether or not the production of documents is injurious to the public service, must be determined by the Head of the Department to which the papers belong, and if he is in attendance and states that in his opinion the production of the documents would be injurious to the public service, their production ought not to be compelled. And in a case decided in the Supreme Court of the United States, *Vogel v. Gruaz*, 4th February, 1884, it was stated that, without the permission of the Government, the Court will not allow confidential information to be disclosed either by the subordinate officer to whom it is given, by the informer himself, or by any other person. The evidence is excluded not for the protection of the witness but upon grounds of public policy. See also *Dawkins v. Rokeby* (h) affirmed by the House of Lords (i), *Black v. Holmes* (j), *Worthington v. Scribner* (k), *Greenleaf Ev.*, sec. 250. It thus appears that the Court is as much bound to protect the documents as the particular officer who has

(g) 5 Ont. R. 227.

(h) L. R. 8 Q. B. 255.

(i) L. R. 7 H. L. 744.

(j) 1 Fox & Sm. 28.

(k) 109 Mass. 487.

them in custody. And it surely is competent for a deputy head or other subordinate officer, without special legislation, to attend with a respectful message from his chief that the production of the documents would be injurious to the public service.

Actio personalis etc.—The law which gave an action to executors or administrators in respect of injuries to the real estate of the deceased, and that which gave an action against the executors or administrators of persons who have committed injuries to the real or personal property of another, is repealed by section 23 of the Amendment Act.

With respect to personal actions, the law will be found clearly set out in Broom's Legal Maxims under the above maxim. If we recollect rightly, the action survived to the executor only when the injury was to the personal estate. The repealed statute gave an action for wrongs done to real estate within six months before the death of the person who suffered the wrong. By the Amending Act the executors may maintain an action for all torts or injuries (i) to the person, (ii) to the real estate, (iii) to the personal estate of the deceased—except in cases of libel and slander. The action is to be brought within one year after his decease.

With respect to actions against the representative of a wrongdoer, the action under the repealed Act might be maintained for wrongs done to the real or personal property of the person wronged, and was to be commenced within six months after the executors or administrators had taken upon themselves the administration of the estate. By the amending Act the action may be maintained for a wrong (i) to the person, (ii) to the real estate, (iii) to the personal estate, of the person wronged by the deceased. Libel and slander are excepted. No time is limited within which the action is to be brought.

Validity of Statutes.—Section 48 of the Omnibus Act gives power to the High Court to entertain an action at the suit of the Attorney-General for the Dominion or of

the Attorney-General of the Province for the declaration of the validity of any statute though no other relief is sought. This is a provision that should have been made long ago. It is not fair that the cost of settling disputes as to the powers of the Legislatures should be cast upon litigants. We would suggest that immediate steps should be taken under this amendment to test the validity of the Creditors' Relief Act, the Act respecting assignments for creditors, and perhaps two or three others.

Exercise of powers of appointment.—No appointment under a power to appoint amongst several objects is to be invalid on the ground that any object of such power has been altogether excluded, and one or more objects so excluded shall not take a share as in default of appointment. Nothing in the Act is to effect any instrument creating a power which is exclusive or non-exclusive in its terms. This is a copy of the English Act, 37 & 38 Vict. cap. 37, which settled the law at that date. The question was recently raised in Quebec as to whether a power to appoint amongst children. "in such proportions as my such son shall decide by his last will," was well exercised by appointing to four out of five children. The Privy Council held that it was well exercised, the law of Quebec being the same as the law of England under remedial legislation (*k*).

A consideration of the remaining Acts must be deferred for the present.

(*k*) *McGibbon v. Abbott*, L. R. 10 App. Ca. 653.

EDITORIAL REVIEW.

Colonial Legislatures—Powers of Suspension.

An important case is reported in the current number of the appeal cases, *Barton v. Taylor*, L. R. 11 App. Ca. 197, in which the powers of Colonial Legislatures to suspend their members are discussed at some length. The action arose in the usual way, by the removal of a member who had been suspended for obstructing the business of the assembly.

The first proposition enunciated by the Judicial Committee is that in the absence of words of prospect or futurity, a rule of the assembly adopting the rules of the Imperial Parliament would not adopt by anticipation all future changes made by the Imperial Parliament.

The next proposition is more important. Referring to the inherent powers of a Colonial Legislature to protect itself against obstruction, interruption or disturbance, Lord Selborne says, "It results from those authorities [*Kielley v. Carson*, 4 Moo. P. C. 63, and *Doyle v. Falconer*, L. R. 1 P. C. 328] that no powers of that kind are inherent in a Colonial Legislative Assembly (without express grant) except (such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute). Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive are necessary."

Thirdly, it is reasonably necessary that some substantial interval should be interposed between the suspension and the resumption by the offender of his place in the assembly. And their Lordships thought that a member might be sus-

pended "during the continuance of any current sitting;" and perhaps the same doctrine would authorize a suspension until submission or apology of the offending member—the prolongation of his suspension in such a case being due, not to the arbitrary discretion of the assembly, but to his own wilful default.

"A power of unconditional suspension," say their Lordships, "for an indefinite time, or for a definite time, depending on the irresponsible discretion of the assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse."

Fourthly, powers to suspend *toties quoties*, in cases of repeated offences, and to expel for aggravated or persistent misconduct, are sufficient to meet the case of a member who is habitually obstructive or disorderly.

Fifthly, a suspensory resolution not expressed to be conditional on something to be done by the person suspended, or to be during pleasure, or for a definite time, must be construed as being operative during the current sitting only.

Sixthly, with the governor's assent, the assembly might pass a rule giving itself power to punish an obstructing member or remove him from the Chamber for any period longer than the sitting during which the obstruction occurred.

The Committee distinguishes between expulsion and suspension and shows the fallacy of arguing that the former includes the latter. The rights of constituents have to be kept in sight, and on expulsion a new election would immediately take place; but continued suspension of a member would deprive the constituents of representation.

The Judicial Committee and Imperial Federation.

The *Law Times*, 3rd July, 1886, says, "Those who regard any practical federation of the British Empire as a chimera, should not forget that an administrative link between the mother country and the Colonies already exists and works in a manner most satisfactory to all interested. On one day in last week the Judicial Committee of the

Privy Council gave judgment in five cases affecting important private and public rights in India, Australia, the Cape of Good Hope, and the North American Colonies. When the citizens of every state in the Empire are content voluntarily to submit their disputes to the arbitrament of a single Court of Appeal—and that Court exclusively English in its composition—the formation of a single Imperial authority dealing with common interests is hardly outside the range of practical politics. The fact that the authority of the Judicial Committee is so highly respected in the colonies is one of which English lawyers have the best reason to be proud.” We think our learned contemporary’s remarks result more from a vivid imagination than a study of the facts. The Judicial Committee is essentially Imperial in its origin, and was provided by the British Parliament as a Court of Appeal for the colonies when they were under a system of government somewhat different from the present. And it may be safely predicated that as long as a Court of Appeal remains, determined litigants will appeal to it if they can afford it, whatever its constitution or origin may be. That is very different from saying that there is a feeling in the colonies for submitting their disputes to an English tribunal for adjustment. The tendency is rather towards independent powers of self-government and administration; and from time to time increased legislative powers have been granted to the colonies, always (we think we may say) at the request of the latter, until now Canada actually imposes duties upon English manufactures. With these increased powers of self-government the desire grows in the colonies to found establishments which shall be peculiarly their own. And so in Canada it has been enacted that when an appeal is taken to the Supreme Court of Canada there shall be no appeal to the Judicial Committee. The Committee, however, have the power to grant leave to appeal in such cases, the fiction being that Her Majesty in her prerogative right allows the parties to be heard on the advice of the Committee. The Canadian enactment indicates a desire *not* to submit Canadian cases to the Privy Council. The Judicial Committee have not themselves

indicated any desire to hear all appeals, for it has been laid down that they will only give leave to appeal in cases on Constitutional Law and cases of public importance.

In cases upon Constitutional Law it must be admitted on all sides that the decisions of the Judicial Committee have not been satisfactory as rules of interpretation. It is impossible to reconcile some of the dicta; and the very narrow rule that the Committee have laid down, viz., that they will only decide the point in dispute without laying down any general principles by which future conduct may be regulated, is destructive of sound jurisprudence. It is better that a wrong principle should be laid down, definite in its terms, and capable of being acted upon, than that a disputed principle should remain a matter of doubt.

Limited Partnerships.

The Week refers to the remarks of a correspondent in the *Statist*, who thinks that the limited liability of the members of joint stock companies is not consistent with the unlimited powers of trading which these companies enjoy; and he suggests that there should be power to form limited partnerships, on the principle that those partners whose names are mentioned in the trading name should be liable to an unlimited extent, and those whose names are not mentioned in the trading name but are designated by the term "Co.," should be liable each for the amount of capital put in by him.

It is not generally known, though it is the fact, that such limited partnerships may be formed in this Province. Chapter 122 of the Revised Statutes allows one or more persons, who are to be called general partners, to join with one or more persons, who are to be called special partners. The general partners shall be jointly and severally responsible as general partners by law, but the special partners shall not be liable for the debts of the partnership beyond the amounts contributed by them to the capital. A certificate of the partnership is to be filed in the County Court office; and all information as to the members, special

partners, and amounts of capital contributed by them may there be obtained.

This privilege has not been largely taken advantage of on account of the growth of joint stock companies; but it furnishes a ready means of obtaining investments for persons who are willing to risk a limited amount of capital for a high rate of interest without incurring the danger of involving their entire fortunes. The scheme is a very ancient one as may be seen from a perusal of Mr. Bates' work reviewed in this number.

Discovery and Privilege.

In a recent case in England, *Mogul Steamship Co. v. McGregor*, a further and better affidavit on production was ordered. The defendants filed the affidavit setting out certain documents which they said were irrelevant. The grounds upon which they were declared to be irrelevant were held to be bad, and a further affidavit was allowed to be filed stating absolutely that the documents were irrelevant. Inspection of the documents was then denied to the plaintiffs. They appealed to a Divisional Court and the decision refusing inspection was affirmed, though one of the judges thought that the documents were relevant.

It is quite possible that documents might not be irrelevant for one certain reason expressed, though they might be for another reason not expressed. But if a party states all the reasons for refusing to produce and they are all held bad, it does not seem just that he should be permitted to deny what has been affirmed against him by the Court and thus claim a privilege from his own opinion which the Court has denied to him on its opinion. The mistake, if there be any, seems to have been in allowing the denial absolutely of the relevancy when the reasons for irrelevancy had previously been given. If the motion for inspection had gone before the Divisional Court on the original affidavit perhaps the result would have been different.

Unregistered Equities.

A peculiar decision has been given by the Judicial Committee of the Privy Council in a case from south Australia, *White v. Neaylon*, affirming the Australian Courts.

By the Australian Act, 5 Vict. No. 8, sec. 8, it is enacted, "that all contracts in writing concerning any lands may after the commencement of this act be registered, and every such contract shall be adjudged fraudulent and void at law and in equity against any subsequent purchaser unless registered, and that, although such subsequent purchaser had notice of such prior contract before or at the time of the making of such subsequent conveyance." In the case in question the equity of the respondent arose out of a parol agreement respecting land partly performed, and so incapable of registration. The appellant with full notice of the equity, took a conveyance of the land and registered it. The Court held that there was nothing in the act to exclude from consideration an equity incapable of registration of which a subsequent purchaser had notice; and they accordingly held that the purchaser took subject to the equity. For a country which professes to give to the world a most perfect system of registration of title, such a result is somewhat astonishing. It is no doubt, a just holding, but it is strange that unwritten equities should stand upon higher ground than written contracts.

English Solicitors in Ireland.

It is gradually becoming apparent that English practitioners can only practise in England. In *Re De Souza*, 9 Ont. R. 39; 5 C. L. T. 136, it was decided that an English Barrister could not practise in Ontario without being duly called to the Bar of that Province. In Australia it has recently been held that a Scotch solicitor could not practise in that dependency without being duly admitted there; and

now it appears that Ireland is closed to them. The *Irish Law Times*, 10th July, 1886, page 343, states that the case of an English solicitor, who had appeared at a Board of Trade enquiry, was commended to the Incorporated Law Society; a case was submitted to the Attorney-General for Ireland for his opinion, and he thought that the solicitor in question had no legal status to be heard if an objection was taken. It appears also that the solicitor's action subjected him to a penalty of £50 as well as other penalties.

BOOK REVIEW.

The Law of Limited Partnership. By CLÉMENT BATES, of the Cincinnati Bar, author of "Ohio Digest," "Pleadings, Parties, and Forms under the Code." Boston : Little, Brown & Co. 1886.

This book, though of American authorship, deals with statute law which has been adopted by our Legislature, and upon which we have some reported cases. These partnerships have been almost superseded by joint stock companies, the facility for trading on a limited capital being entirely unlimited when the capital is turned into "shares." . Notwithstanding this, these partnerships have their uses. They furnish a means whereby one man having a limited amount of capital which he is willing to risk in trade is enabled to invest it in a business which may give him a larger return than any other investment he can make without risking his whole fortune. It also enables men who have skill but no capital to secure the aid of capitalists who themselves shall be limited in their liability. The book deals with all phases of these partnerships and cites our own, as well as American, cases. We hope that it may be the means of extending acquaintance with the useful legislation which composes its subject-matter.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

LONDON & CANADA L. & A. CO. v. WARIN.

*Navigation—Interference with—Navigable water—Water lots—Crown grant
—Easement—Trespass.*

W. was lessee under a lease from the city of Toronto of certain water lots held by the said city under patent from the Crown granted in 1840, the lease to W. being given under the authority of the patent, and of certain [public statutes respecting the construction of the esplanade which formed the northern boundary of the water lots.

Held, affirming the judgment of the Court below, that the lease gave to W. a right to build as he chose upon the lots, subject to any regulations which the city had power to impose, and doing so to interfere with the right of the public to navigate the water.

Held, also, that the waters being navigable parts of the Bay of Toronto, no private easement could be acquired therein while they remained open for navigation.

Arnoldi, for the appellants.

C. Robinson, Q.C., and *T. P. Galt*, for the respondents.

In re STANDARD FIRE INSURANCE COMPANY.
CASTON'S CASE.

Winding up Company—Contributories—Subscription for stock—Agreement to pay for stock by professional services.

The Act of incorporation of a Joint Stock Company provided "that no subscription for stock should be legal or valid until 10 per cent. should have been actually and *bona fide* paid thereon."

C. a solicitor, gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, the power of attorney containing these words, "and I herewith enclose ten per cent. thereof and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not in fact enclosed, but the amount was placed to the credit of C. in the books of the company, and a certificate of stock issued to him which he held for several years. In winding up the company, C. was placed on the list of contributories. C. gave evidence in the proceedings that the sum to his credit was for professional services performed for the company, he having been appointed a local solicitor, and that there had been an arrangement that his stock was to be paid for by such services.

Held, affirming the judgment of the Court below, Henry, J., dissenting, that C. was rightly placed on the list of contributories.

A. C. Galt, for the appellant.

Bain, Q.C., for the respondent.

CANADA SOUTHERN RY. CO. v. CLOUSE,

Farm crossing—Liability of Railway Company to provide—Agreement with agent of company—14 and 15 Vict. cap. 81, sec. 13—Substitution of "at" for "and" by Con. Stat. of Can. cap. 66, sec. 13.

The C. S. R. Company, having taken for the purposes of their railway the lands of C., made a verbal agreement with C. through their agent T., for the purchase of such lands, for which they agreed to pay \$662; and they also agreed to make five farm crossings across the railway on C's farm, three being level crossings, and two, under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C. his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he

was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid.

The farm crossings agreed upon were furnished and maintained for a number of years, until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction.

Held, Ritchie, C.J., and Fournier, J., dissenting, that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not therefore compel the company to provide an under crossing through the solid embankment formed by the filling up of the road the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm.

Held, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location and number of said crossings to be determined on a reference to the Court below. *Brown v. The Toronto & Nipissing Ry. Co.*, 26 C. P. 206, overruled.

Semble, that the substitution of the word "at" in sec. 13 of cap. 66, of the Con. Stat. Can. for the word "and" in sec. 13 of cap. 51 of 14 & 15 Vict. is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter or affect.

The judgment of the Court below, 11 App. R. 287 reversed.

Cattanach, for the appellants.

McCarthy, Q.C., and *Robb*, for the respondent.

CANADA SOUTHERN RY. CO. v. ERWIN.

Farm crossing—Agreement for cattle pass—Construction of—Liability of Railway company to maintain—Substitution of solid embankment for trestle bridge.

In negotiating for the sale of lands taken by the C. S. Ry. Company, for the purposes of their railway, the agent of the company signed a written agreement with the owner, which contained a clause to the effect that such owner should have "liberty to remove for his own use all bad buildings on the said right of way, and that, in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle, the company will so construct their fence on each side thereof as not to impede the passage thereunder."

Held, reversing the judgment of the Court below, 11 App. R. 306, Ritchie, C.J., dissenting, that under this agreement the only obligation on the company was to maintain a cattle pass as long as the trestle bridge was in existence, and it did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor without providing a pass under such embankment.

Cattanach, for the appellants.

McCarthy, Q.C., and *Robb*, for the respondent.

CANADA ATLANTIC R. CO. v. CITY OF OTTAWA.

Municipal corporation—By-law—36 Vict. cap. 48 (O)—Bonus to railway—Vote of ratepayers on by-law for—Premature consideration of by-law—Error in copy submitted to ratepayers—Signing and sealing by-law—To be passed by same Council.

A by-law was submitted to the Council of the City of Ottawa, under 36 Vict. cap. 48, for the purpose of granting a bonus to a Railway Company then in course of constructing their railway, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the provisions of the statute, such by-law was to be taken into consideration by the council after one month from its first publication, on the 24th September, 1873. The vote of the ratepayers was in favour of the by-law, and on 20th October a motion was made in the council that it be read a second and third time, which was carried, and the by-law was so read and passed. The mayor, however, refused to sign it on the ground that its consideration was premature, and on 27th November the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was on this occasion carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid, and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1883, an action was brought against the Corporation of the City of Ottawa for the delivery of debentures provided for by the city by-law, in which suit the question of the validity of the whole proceedings was raised.

Held, affirming the judgment of the Court below, 12 App. R. 234; 4 C. L. T. 399, (i) that the vote of 20th November, 1873, was premature and not in conformity with the provisions of section 231 of the Municipal Act, and that the mayor properly refused to sign it, and that without such signature the

by-law was invalid under section 226. (ii) That the council had power to consider the by-law on 5th November, 1873, and the matter was then disposed of. (iii) That the proceedings of 7th April, 1874, were void for two reasons; one, that the by-law was not considered by the council to which it was first submitted, as provided by section 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates.

Semble, that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote.

McCarthy, Q.C., O'Gara, Q.C., and Gormully, for the appellants.
MacTavish, for the respondent.

QUEBEC.]

WINDSOR HOTEL COMPANY v. CROSS.

Promise to pay cessionnaire without reserve—Garant—Compensation, plea of—Interest, agreement as to.

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N. P., by which without any reserve they acknowledged to owe and promised to pay certain sums of money (amongst others) to one Mrs. L., transferee of one of the vendors of the property upon which the appellant company's hotel is now built, and who had sold with warranty. Subsequently Mrs. L. on the 15th June, 1880, by notarial deed transferred to the respondent the balance payable to her, and the transfer was duly signified to the company. In 1883 the respondent sued the appellants for \$2,231.37, the balance then due her and the interest under the said deeds.

To this action the appellants pleaded, *inter alia*, that interest was due from 1st July, 1881, only; the parties having agreed to waive the right to exact interest until the net revenue of the hotel should be sufficient to pay the annual liability for interest, insurance, etc., which was the case only from the 1st July, 1881, and that they were entitled to oppose in compensation a larger sum paid to the Corporation of Montreal for assessment imposed under 42 & 43 Vict. cap. 53 (Q.) which statute was passed after the purchase. To this the respondent replied that the appellants had accepted Mrs. L. as a new creditor delegated to receive payment, and had waived all pretension or grounds which they might have set up against their vendors, and that all assessments imposed or attempted to be imposed prior to 42 & 43 Vict. cap. 83 were null and void, and had been so declared.

The Superior Court held that the compensation pleaded had taken place and dismissed the respondent's action.

On appeal this judgment was reversed by the Court of Queen's Bench for the following, amongst other reasons :—That neither the respondent nor her *auteur*, Mrs. L., were garants of the company, and that the respondent was entitled to be paid, notwithstanding any claim the company might have against their vendors under the warranty stipulated in their deed of sale. On appeal to the Supreme Court of Canada,

Held, that the above reason given by the Court of Queen's Bench was sufficient to dismiss the appellants' plea of compensation.

Held, also, on cross appeal, affirming the judgment of the Court below, that interest should only be charged from 1st July, 1881.

Pagnuelo, Q.C., for the appellants.

Geoffrion, Q.C., for the respondent.

NOVA SCOTIA.]

MCDONALD v. MCPHERSON.

Bill of Lading—Assignment of—Property in goods under—Stoppage in transitu—Replevin.

H., of Souris, P. E. I., carried on the business of lobster packing, sending his goods to M., of Halifax, N. S., who supplied him with tin plates, etc. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef via Picton and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Picton to the freight agent of the I. C. R., or his assigns, the freight to be payable at Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H. drew on M. for the value of the consignment. but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded to Picton, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent;

Held, affirming the judgment of the Court below, Henry, J., dissenting, that the goods were sent to the agent at Picton to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them.

Held, also, that whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply that of a wrong-doer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them.

Henry, Q.C., for the appellant.

Graham, Q.C., for the respondent.

TROOP v. MERCHANTS' MARINE INS. CO.

Marine insurance—Insurance on freight—Constructive total loss—Abandonment—Repairs by underwriters.

A vessel proceeding on a voyage from Arecibo to Acquim, and thence for New York, encountered heavy weather, was dismasted and towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent, and refused to assist in repairing the damage and complete the voyage. The agent had the vessel repaired and brought her to New York with the cargo.

In an action to recover the insurance on the freight,

Held, reversing the judgment of the Court below that there being a constructive loss of the ship, the action of the underwriters in making the repairs and earning the freight would not prevent the assured from recovery.

Graham, Q.C., for the appellants.

Henry, Q.C., for the respondents.

NEW BRUNSWICK.]

HANAGAN v. DOE DEM ELLIOTT.

Assessment on real estate—In name of occupier—Description as to persons and property—Con. Stat. (N.B.), cap. 100, sec. 16.—Several assessments in one warrant—Illegal assessment in.

The Consolidated Statutes of New Brunswick, C. S. N. B. cap. 100, sec. 16, relating to rates and taxes, provides that "real estate [shall be assessed] where the assessors cannot obtain the names of the occupier or person having ostensible control, but under such description as to persons and property . . . as shall be sufficient to indicate the property assessed, and the character in which the person is assessed."

I. G., the owner of real estate in Westmoreland County, N. B., died, leaving a widow who administered to his estate and resided on the property. The property was assessed for several years in the name of the estate of I. G., and in 1878 it was assessed in the name of "Widow G."

Held, affirming the judgment of the Court below, that the last named assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed and the character in which the person was assessed.

Where a warrant for the collection for a single sum for rates for several years, included the amount of an assessment which did not appear to be either against the owner or the occupier of the property,

Held, affirming the judgment of the Court below, that the inclusion of such assessment would vitiate the warrant.

Borden, for the appellants.

R. Barry Smith, for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT.]

WESTERN BANK v. GREEY.

Mortgagor and Mortgagee—Trespass—Estoppel by acquiescence.

B., the owner of a mill subject to a first mortgage for \$4,000, held by one K., gave a second mortgage to plaintiffs. Subsequently B. being desirous of having the mill converted from the "stone" to the "roller" system, applied to M., manager of the Ont. L. & S. Co., for an advance of \$7,300, to enable him to pay off the mortgage and leave a surplus to be applied in part payment of the cost of reconstruction, which advance the Co. agreed to make, and a mortgage for that amount was duly executed by B. in favour of the Co.

B. thereupon entered into an agreement with defendants under which defendants were to reconstruct the mill for \$4,800—\$2,000 to be paid on completion of the mill and balance in three equal annual payments secured by second mortgage on the property, and it was one of the terms of agreement that defendant should be *at once* furnished with a letter

from M. agreeing to pay the \$2,000 on completion of the mill. Defendants, without communicating with M., commenced work, and did not ask him for such letter until after the work had progressed for several weeks and M., when applied to for such letter, informed defendants that he had not agreed with B. to give a letter for any specific sum but only for whatever balance there might be left out of said sum of \$7,300 after paying off prior incumbrances, and that after allowing for the amount of such prior incumbrances there only remained about \$1,200, which latter amount he was willing to undertake to pay on the mill being completed. Defendants, in the course of reconstruction, had taken out most of the old machinery and put in new, and made considerable alterations, and upon M. declining to undertake to pay \$2,000 they removed the new machinery put in, and left the mill in a dismantled condition. At the time defendants commenced work the amount due on plaintiffs' mortgage was about \$2,700, and plaintiffs alleged that the mill property was then, as a going concern, ample security for payment of their claim after satisfying the first mortgage, but that, owing to defendant's taking out the old machinery and leaving the mill dismantled, its value was greatly diminished. The mill whilst in such dismantled state was sold under power of sale in K.'s mortgage, and only realized enough to satisfy it, and plaintiffs contending that defendants had, by their acts, diminished the value of their security, and that B. the mortgagor was insolvent, brought this action to recover damages to the extent to which their security was impaired. It appeared in evidence that M., besides being manager for the Loan Co. was also plaintiff's manager, and that he was aware that B. had made a contract with defendants for remodelling the mill although he did not know the precise terms of such contract, and that he saw the work in progress and raised no objection, plaintiffs, however, contending that defendants knowing plaintiffs were mortgagees should not have relied on B.'s statement that M. had agreed to advance a specific sum, but should before commencing work, have made enquiries of M., and that M.'s implied assent to the reconstruction on the supposition that defendants should complete the work and thus enhance the value of plaintiff's security could not be relied on as an assent to do something which would materially diminish the value of such security. The learned Judge at the trial dismissed the action, holding (following *Baker v. Mills*, 11 O. R. 253) that plaintiffs, as second mortgagees, not having the legal estate, and not being in possession, could not maintain any action.

Held, per Wilson. C.J., and Armour, J., that plaintiffs must fail, not on the ground upon which the learned Judge at the time dismissed their action, but upon the ground that they had by their conduct and acquiescence precluded themselves from bringing it.

Per O'Connor, J. The plaintiffs must fail on both grounds.

RYAN v. BANK OF MONTREAL.

Bill of Exchange—Forged signature of drawers—Forged endorsement of drawers—Estoppel.

The plaintiff made an arrangement in Toronto with one Hamilton Young, an employee of the Hamilton Cotton Co., to discount their draft on J. P. Billings & Co, New York, for \$4,989.65 at 3 months, and in pursuance of this arrangement a draft was drawn in Hamilton by Hamilton Young in the name of the Hamilton Cotton Co., on the plaintiff, payable on demand to their own order for \$4,800 dated 23rd July, 1883. This draft was taken by Hamilton Young to the defendants' Banking House at Hamilton and there discounted by him, and the proceeds of the discount drawn by cheques in the name of the Company. The draft was then forwarded by the defendants to their house in Toronto, who presented the same to plaintiff for acceptance and payment. The plaintiff then discounted the first mentioned draft with the defendants at Toronto, and with the proceeds paid the draft for \$4,800. The plaintiff about the 11th September, 1883 discovered that both drafts had been forged by Hamilton Young, and immediately notified the defendants of the forgery and demanded payment of the amount of the demand draft which payment the defendants refused. The plaintiff paid the first mentioned draft at maturity.

Held, that although the plaintiff by acceptance and payment was estopped from disputing the signature of the drawers, the Hamilton Cotton Co., to the bill, yet he was not estopped from denying their signature as endorsers, even though it was on the bill at the time of acceptance and payment.

Held, also, that the defendants having no title to the bill, the indorsement being a forgery, were not entitled to receive payment, and having been paid the plaintiff was entitled to recover the amount so paid.

Held, also, that the plaintiff was not estopped by the delay in discovering the forgery, there being no actual genuine party on the bill to whom the defendants could have recourse, and having lost all remedy by such delay.

Jas. MacLennan, Q.C., and Haverson, for the plaintiff.

Bruce, Q.C., for the defendants.

WEIR v. GRAPE WINE CO.

Sale of land—Subsequent conveyance—Registration—Priority—Jurisdiction.

Held, that the grantee in a subsequent conveyance, registered before the registry of a previous conveyance from the same grantor, of whom the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that this Court had power to so order upon such terms as seemed just.

W. Bell, for the motion.

Osler, Q.C., contra.

MATTHEWS v. HAMILTON POWDER CO.

Negligence of fellow servant—Superintendence of director—Negligence of Company.

The plaintiff sued as administratrix of George Matthews who was killed on the 9th of October, 1884, by an explosion at the defendants' mills for the manufacture of powder at the village of Cumminsville, in the County of Halton. The head offices of the defendant Company were in Montreal. The works at Cumminsville were carried on by a Superintendent, whose duty it was to hire, discharge and pay the workmen, keep the machinery, works and buildings in repair, and generally to manage and control the business, subject however to such instructions as he might receive from the head office, and subject to the further superintendence of one Watson, one of the directors who lived in Hamilton, and who occasionally visited the works. Some time prior to the explosion, and while the works were idle during the summer months, Watson visited the works. At that time the shaker, a machine used in the manufacture of powder in one of the several buildings composing the works called the Crackers, was out of repair. Watson gave directions to Corlett, the Superintendent, and to Dent, a carpenter, employed on the premises, to have this machine repaired prior to commencing operations. The machine was not repaired through the neglect of the Superintendent, or through the Company having sent orders to be filled before the repairs could be made.

Held, that though the Superintendent's neglect was the neglect of a fellow workman, yet Watson a Director having given express directions to have the repairs made, Corlett's neglect to repair the shaker was the neglect of the Company, and the defendants were liable.

Robinson, Q.C. and *E. Martin, Q.C.*, for the motion.

Fullerton, contra.

TUCKER v. McMAHON.

Corroborative evidence—R. S. O. cap. 62. sec. 10.

The plaintiff, after her husband's death and about 25 years before action brought, went to live with testator her son-in-law, and resided with him up to the time of his wife's death about twelve years before action.

She alleged that after her daughter's death testator agreed to pay her wages if she would continue to live with him and take care of his family.

She accordingly did so till his death in 1885, up to which date she had received nothing from him. In an action against his estate for wages plaintiff relied on the evidence of a witness to the effect that testator about two years before his death told witness, plaintiff should be handsomely paid for her services, and also on the evidence of another son-in-law that two or three years before his death testator told witness that he would pay her well. It also appeared that by his will testator directed all his property to be converted into money and invested on mortgage security and the whole income paid to plaintiff during her lifetime, but there was no evidence as to the value of the bequest, and it was suggested that after payment of debts the residue would be very small.

Held, that there was no sufficient corroborative evidence within R.S.O. cap. 65, sec. 10.

NEWCOMBE v. ANDERSON.

Replevin—Boarding-house-keeper—Lien—R. S. O. cap. 147.

One J. and his wife took rooms in premises called the "Shandon House" kept by defendants, partly furnishing them and agreeing to pay \$50 a month therefor and for their board. They subsequently rented from plaintiff a piano.

Held, that the relation between defendants and J., was not that of innkeeper and guest, but of boarding-house-keeper and boarder.

Held, also that the piano was not part of the baggage of J., or his wife and that under R. S. O. cap. 147, the defendants had no lien upon it for their board.

Quære, whether the house kept by defendants was an inn within the meaning of R. S. O. cap. 147, sec. 1.

McLaren, for the plaintiff.

Ritchie, Q.C. for the defendant.

OLMSTEAD v. ERRINGTON.

Division Court—Prohibition—Practice—Costs of application for writ—Entitling of affidavits—O. J. A. secs. 23 and 25—Amendments—Rule 74.

Where a defendant, upon being sued in the First Division Court in the County of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a Judge in Chambers for an order directing the issue of a writ of prohibition to the said Division Court to prohibit the Judge thereof and the plaintiff from proceeding with the suit in that Division Court, on the ground of want of jurisdiction in that Court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit filed in support of the motion in any Division of the High Court of Justice.

Held, affirming the order of O'Connor, J., in Chambers, granting the writ not a fatal objection, but one which could and should be amended under Rule 474.

Held, also that although before the motion for prohibition came on to be heard, the plaintiff in the Division Court caused the plaint to be transferred to the proper Division Court in the County of Lambton, nevertheless the defendant upon being sued in a wrong Division Court, had the right to apply for prohibition, and the learned Judge in Chambers having in his discretion given the defendant the costs of the motion for prohibition, that discretion could not be interfered with.

REGINA v. SHEVELEAR.

Canada Temperance Act—County, meaning of—Indians.

The defendant was convicted for having sold intoxicating liquors on the 16th day of December, 1884, at the Township of Oakland, in the County of Brant, being the day on which the vote for the passage of the Canada Temperance Act for the County of Brant was taken. The Townships of Oakland and Burford in the County of Brant, had been for the purposes of Dominion Elections separated from the County of Brant and annexed to the adjoining County.

Certain portions of the County of Brant consists of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act, 1880 and amendments thereto.

Held, that the word "County" as used in the Act means County for judicial and not for electoral purposes.

Held, also that under the eighth objection to the conviction that it did not appear that the votes of the electors on the Indian lands in the County were taken upon the petition for the Act, that proper means were taken to enable them to exercise their franchise or that they were permitted to exercise it.

REGINA v. MARSHALL.

Hawkers and peddlers—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vict. cap. 40 (O.)—Conviction under County by-law—Meaning of word “agent” in amending Act.

Held, that, under 48 Vict. cap. 40 sec. 1 (O.), amending sub-sec. 3 of sec. 495 of the Con. Mun. Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, &c., is not within the restriction preventing “agents for persons not resident within the county” from so doing, and is not such an agent.

REGINA v. BASSETT.

Hawkers and peddlers—Con. Mun. Act, 1883, sec. 495, sub-sec. 3, as amended by 48 Vict. cap. 40 (O.)—Conviction under county by-law—Exposing samples of cloth and soliciting orders for clothing—Meaning of term “dry goods” in amended Act.

Held, that, under 48 Vict. cap. 40, sec. 1 (O.), amended by sub-sec. 3 of the Con. Mun. Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth and to be then delivered to the person giving such orders.

Held, also, that the term “dry goods” in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT.

TOMLINSON v. MORRIS.

Sale of goods—Agreement, construction of—Warranty—Written notice—Waiver.

By a written agreement the defendants sold a threshing machine to the plaintiff at a named price, the right of possession to be in the plaintiff until default, but until payment the right of property to be in the defendants, with a warranty by the defendants that with good management the machine would do good work and was not inferior to any other machine made in Canada in its adaptation for separating and saving grain from straw with the waste, etc., and that if upon starting the machine the plaintiff should intelligently follow the printed hints rules and directions of the manager, and if so doing were unable to operate it well, written notice stating wherein it failed to satisfy the warranty was to be given by him to the defendants, and a reasonable time allowed to get to it and remedy the defect, unless of such a nature that the defendants could advise by letter; and if the defendants were not able to make it operate well, etc., and the fault was in the machine. they were to take it back and refund the payments made or remedy the defective part. No printed hints, etc., were given. The defendant had on the plaintiff's complaint attended and made alterations in the machine after which the plaintiff used the machine, but subsequently sent it back to the defendants, because he said it did not comply with the warranty, but as the defendants understood, to be repaired. No written notice, as required by the warranty, was given.

Held, that in the absence of the printed hints, etc., the parties must be deemed to have dispensed therewith; that to avail himself of the warranty the plaintiff should have given the written notice; and that the attendance to make the alterations was not under the circumstances, a waiver of such notice; but in any event was a question for the jury.

Hardy, Q.C., for the plaintiff.

Robertson, Q.C., for the defendant.

ST. VINCENT v. GREENFIELD.

By-law to establish road allowance—Boundaries—Defective for want of—Statute labour upon roads.

A by-law to establish a road allowance must on its face show the boundaries of the road or refer to some document wherein they are defined, and the intention of the framers of the by-law cannot be ascertained by the aid of extrinsic evidence.

Held, therefore that a by-law to establish a road on a blind line between two concessions in the defendant township was, by reason of such omission, defective.

Held, also, that on the evidence set out in the case, the road in question had not become a public highway by reason of statute labour having been performed thereon.

Creasor, Q.C., for the plaintiff.

A. Frost, for the defendant.

REGINA v. ANDREWS.

Criminal law—Evidence, admissibility of—Accomplice—Corroborative evidence.

The prisoner was indicted for unlawfully using an instrument on one J. L., with intent to procure a miscarriage. J. L. was called for the prosecution to prove the charge, and in cross-examination stated that she had not told W. A., H. R. and M. T., that before the prisoner had operated on her she had been operated on for the purpose of procuring a miscarriage by Dr. B. W. A., H. R. and M. T. were called for the defence, and swore that J. L. had so stated to them. Dr. B. was then called by the Crown and he swore that he had operated on J. L. as stated.

Held, that the evidence of Dr. B. was admissible.

Held, also, that the omission of the learned Judge at the trial to tell the jury that the evidence of an accomplice ought to be corroborated, did not entitle the prisoner to have the conviction reversed, and in this case there was no necessity for the caution as there was abundance of corroborative evidence.

Osler, Q.C., for the prisoner.

McMahon, Q.C., for the Crown.

ADAMSON v. CITY OF TORONTO.

Municipal corporation—Injury to property by raising sidewalk—Arbitration.

The corporation of the City of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of the plaintiff's premises, whereby as was alleged, the plaintiff's premises were injured.

Held, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Municipal Act.

C. Durand, for the plaintiff.

Foster, Q.C., for the defendants.

LONDON INS. CO. v. CITY OF LONDON.

Assessment—Income—Mutual Insurance Company—Appeal to County Judge—Finality.

The defendants assessed the plaintiffs for \$590.52 on an alleged income of \$27,000, being the balance of moneys received by the plaintiffs, a Mutual Insurance Company, for premiums, etc., after payment of the current year's losses and expenses. The plaintiffs contended that there was no income, for that the balance under the statutes relating to the plaintiffs was to be applied in reduction of assessments on the premium notes for the ensuing year ; and on an appeal to the Court of Revision the assessment was confirmed.

The plaintiffs then appealed to the County Judge who dismissed their appeal. They then paid the amount under protest, and brought this action to recover it.

Held, that the decision of the County Judge was final and that this action was not maintainable.

E. R. Cameron, for the plaintiffs.

W. R. Meredith, Q.C., and *T. G. Meredith*, for the defendants.

HARE v. CAWTHROPE.

Notice of trial—Joinder of issue—Close of pleadings—Counter-claim.

The plaintiff delivered a reply to the defendant's statement of defence and counter-claim, simply stating that the plaintiff joined issue upon the defence and counter-claim.

Held, that this reply closed the pleadings, and notice of trial served with it was therefore regular.

Shepley, for the defendant.

Aylesworth, for the plaintiff.

[WILSON, C. J.]

In re O'MEARA & THE CITY OF OTTAWA.

Municipal by-law—Sale of fresh meat—Carcase—Restriction—Reasonable accommodation.

By section 503 of the Municipal Act, 1883, the Council may, subject to the restrictions and exceptions contained in the six next preceding sections, pass by-laws as provided by the following sub-sections:—“(1) For establishing markets. (2) For regulating markets, etc. (3) For

preventing or regulating the sale by retail in the public streets or vacant lots, etc., of any meat, etc. (4) For preventing or regulating the buying and selling of articles, or animals exposed for sale or marketed. (5) For regulating the place, and manner of selling and weighing grain, meat * * and all other articles exposed for sale, and the fees to be paid therefor, etc. (6) For granting annually or oftener licenses for the sale of fresh meat in quantities less than by the quarter carcase, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee * * and for preventing the sale of fresh meat in quantities less than by the quarter carcase, unless by a person holding a valid license, and in a place authorized by the Council, etc. The restrictions and exceptions, as far as applicable, are those contained in sub-sections 4 and 6 of section 497. Sub-section 4 applies to articles for sale brought into the municipality after 10 a. m., upon which market fees are not to be imposed unless they are offered for sale in the market; and sub-section 6 applies to those persons who go to the market place before 9 a. m. between 1st April and 1st November, and before 10 a. m. between 1st November and 1st April, with any article they may sell in the market place; and with regard to such persons that after these respective hours they shall not be compelled to remain on the market place, but may proceed to sell elsewhere on paying the market fees.

Held, that a by-law passed under sub-section 6 need not be made subject to such restrictions, etc., for the proper construction of the sections is that section 503 is made subject to such restrictions, as far as properly applicable, and that sub-section 6 is in the nature of an exception from the general restrictions, etc.

Semble, that the Court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but, as a rule, the municipality is the judge of its own business and affairs, and it is probably an extreme case in which the Court would interfere.

W. H. P. Clement, for the appellant.

MacLennan, Q.C., contra.

[CAMERON, C. J.]

HODGSON v. BOSANQUET.

Municipal Corporation—Arbitration and award—Compensation—Reference to County Judge.

A portion of a drain constructed by a Township having been dug on the plaintiff's land, an arbitration was had under the municipal act to ascertain the compensation the plaintiff was entitled to by reason of the

damage alleged to have been sustained by him, (i) for land taken for the drain, (ii) for the throwing of earth on the land at the side of the drain, (iii) for the building of bridges by the plaintiff to cross the drain, and (iv) the backing of water in the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damages and they made an award against him imposing on him a large portion of the costs.

Held, that the evidence sustained all the grounds of damage except the last as to which the evidence was not very satisfactory. The learned Judge was therefore of opinion that he could not ascertain the compensation himself, and so set aside the award, and intimated that unless the parties could agree on new arbitrators, he was disposed to direct a reference to the County Judge.

Aylesworth, for the plaintiff.

Lash, Q.C., for the defendants.

In re SMITH & CORPORATION OF PLYMPTON.

Municipal Act—Arbitration and award—Certainty of subject of reference—Arbitrator refusing to act—Award by two—Revoking arbitrators' authority—Appointing third arbitrator—Meeting of arbitrators.

A township by-law, after reciting that there was a difficulty with S. "from alleged damage from water flowing from local drains known as the H. and L. drains," enacted that F. was appointed arbitrator for the Township. The notice given by the Reeve to S. read that "the corporation has elected that the claims made by you for damages to the east half of lot 11, etc., on account of the construction of the dam from P. to the S. drain or consequent thereon shall be referred to arbitration." Before the parties had been heard on the merits the plaintiff's arbitrator withdrew from the arbitration and refused to act; but the other two proceeded with the reference and made an award.

Held, that the reference was wholly informal, the subject thereof not being properly defined, and though the notice given by the Reeve to S. would make the matter sufficiently clear it did not affect S. for he never entered upon the arbitration but repudiated the arbitrator's authority at the first meeting of which he had notice.

Held, also, that the award, at any rate, was bad by reason of two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of their appointment until the award has been made, and enabling the County Judge to appoint another arbitrator in the place of the one refusing or neglecting to act.

Quare, whether it is in the power of either party to the reference to revoke the authority of the arbitrators.

Semble, that the provision in the statute that the arbitrators must hold their first meeting within twenty one days from the appointment of the last arbitrator is not imperative, but directory merely ; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month as required by the act.

Semble, also, that the County Judge may appoint the third arbitrator *ex parte*, although this is not desirable ; and that the power to appoint does not depend on the disagreement of the two arbitrators but on their failure to agree within the seven days limited therefor.

Richards, Q.Q., and *Nelson*, for the plaintiff.

W. Macdonald, for the defendants.

[GALT, J.]

REGINA v. DALY.

Canada Temperance Act, 1878—Day of adoption—Evidence of accused—Not bound to criminate himself.

On an application to quash a conviction under the Canada Temperance Act, 1878,

Held, that the adoption of the act is on the day of polling.

Held, also, that under section 128 of the act, by which the accused is made a competent and compellable witness, he is not bound to criminate himself.

Robinson, Q.C., and *Geo. Tate Blackstock*, for the appellant.

Edwards, contra.

[PROUDFOOT, J.]

YOUNG v. PURVIS.

Will, construction of—Disposition of real and personal estate—Appointment of executors—Description of land—Parol evidence—Maintenance—Charge on land—Infant executor—Devastavit.

A testator directed his executors " hereinafter named " to pay his debts and funeral expenses ; and then devised the residue as follows:—To his son David " lot 16 concession 7 N. H." real and personal property ; the said David to pay to each of his daughter \$500, naming them ; Christina,

one of the daughters, to remain on the farm, and her legacy to be given her when she became of age. No executors were named in the will.

Held, that there was an effectual disposition of the real and personal estate; that in a disposition of personal estate executors need not be expressly named, but may appear by implication; and that David was executor according to the tenor of the will.

Held, also, that parol evidence was admissible to show that the land devised was in the Township of Morris, that N. H. meant north half, and that it was the only land owned by the testator.

Held, also, that parol evidence was admissible to show that Christina was 23 years of age when the will was made, though referred to therein as a minor; and that she was of delicate health and weak mind; that as regards the provision made for her she must be treated as an adult, and that it would not include maintenance.

Held, that an infant, whether an executor, or an executor *de son tort*, is not liable for a devastavit.

Legacies directed to be paid out of a mixed residue are a charge on land.

Garrow, Q.C., for the plaintiff.

M. G. Cameron, for defendant Purvis.

Malone, for Toronto General Trusts Co.

[ROSE, J.]

CRAWFORD v. BUGG.

Landlord and tenant—Short Form Covenants—Assigns—Implied covenant—Waste—R. S. O. cap. 107, sec. 19.

On 19th May, 1870, E. made a lease of certain premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was a mere trustee for the plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without the plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rent from sub-tenants and paying the head rent to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal and was in the ordinary printed form, and purported to be under the Short Forms Act, and the statutory covenants were prefaced by the words, "and the said lessee for himself, his heirs, executors, administrators and assigns, covenants in manner and form following, that is to say." Then followed the ordinary statutory covenants, except that after the covenant to repair were the words "reasonable wear and tear and damage by fire and tempest excepted"; and after the covenant not to assign the additional

covenant "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign (except as to the additional words) was in the language used in the Short Forms Act.

Held, that the covenant not to assign or sublet, etc., did not extend to assigns, they not being named; and the prefatory words to all the covenants had no contrary effect; and therefore J. B.'s assignment to C. B. was no breach thereof.

Held, that the covenant to repair ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B., and he would only be liable for the breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words "reasonable wear and tear, etc."

Held, also, that there could be no liability on the part of the defendants or executors of J. B. for breach of an implied covenant by themselves and J. B. to use the premises in a tenant-like manner; for, there being a lease under seal with express covenants, no such covenant would be implied.

Held, also, that an action of waste would lie notwithstanding the express covenants to repair; but there must be what would constitute waste—a mere breach of covenant not amounting to waste not being sufficient. To maintain such an action the plaintiff must have a vested interest in the reversion at the time waste is committed.

Held, that, under R. S. O. cap. 107, sec. 9, it is not necessary for the defendant to set up the statute as a defence; for the plaintiff must show that the wrongs for which action is brought occurred within six months before the testator's death.

Held, that there was no breach of the covenant to repair according to notice, for the notice was given to J. B. after he had parted with his interest in the term.

Aylesworth, for the plaintiff.

Lash, Q.C., for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 16TH JUNE, 1886.]

MILLETT v. SABOURIN.

Deed subject to condition of maintenance—Place of Maintenance—Refusal of Covenantee to leave premises conveyed—Broken condition—Forfeiture.

H. S., by deed dated Nov. 4th, 1863, granted his farm and some chattels to his son T. S., in consideration of \$300, "subject to be defeated and rendered null and void upon the non-performance of the said party of the second part of the following condition or any part thereof, viz., The said party of the second part covenants to feed, clothe, support and maintain the said party of the first part . . . during the term of

his natural life . . .” T. S. having fulfilled the condition during his lifetime died on October 5, 1885, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house and have him provided for there or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment, and recovered judgment and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. In an action of ejectment by the infant daughter of T. S. claiming under the deed to her father against the defendant, it was

Held, affirming the judgment of Armour, J., Proudfoot, J., dissenting, that the grantor was not bound to accept the offers made and that the conditions of the deed were broken and the land forfeited.

Per Armour, J., at the trial. The deed must be construed as being made upon conditions and as being defeated and rendered void by the non-performance of the covenant. The effect of the covenant is that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require to go, and he was justified in refusing to accept the offers made.

Per Boyd, C. The parent who for value purchases the right to support from his son, has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the Court ought to respect these in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead such as should induce the Court to disregard the general rule. The result is that the conditions of the deed were broken and the land forfeited.

Per Proudfoot, J. The life interest of H. S. was not reserved out of the land; it rested solely on the condition with probably an equitable charge on the land. The condition to maintain is without specification of place; it imposes no personal obligation on the grantee; it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representatives might reasonably offer.

Per Ferguson, J. It was a condition annexed to the estate granted the proper effect of which was that if broken the title would go to the grantor or those claiming from him the reversion in the lands, the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revert the estate.

Shepley, for the plaintiff.

Moss, Q.C., for the defendant.

[BOYD, C., 5TH JUNE, 1886.]

VERMILYEA v. CANNIFF.

Patent—Assignment of territory—Defence of others manufacturing—Absence of fraud, warranty and misrepresentation in the bargain—Plaintiff's rights.

The plaintiffs, V. & V., being the patentees of a certain article by memorandum in writing under seal assigned all their interest in the patent to C., the defendant, for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by C. In an action to recover the consideration the evidence of C. went to show that he knew before the first year after the making of the contract had expired, that others were manufacturing the patented article but he did not complain or repudiate the transaction, or refuse to pay or offer to reassign, or require the alleged infringers to desist or call upon the patentees to vindicate their patent and that he had a profitable user of the invention to a substantial extent.

Held, that in the absence of fraud or warranty, or representations which induced the bargain and were falsified in the result, such a contract is simply for the purchase of an interest in an existing patent. No assumption arises and no implication is to be made that the patent is indefeasible. The plaintiffs were therefore held entitled to judgment.

Smith v. Neale, 2 C. B. N. S. 89, commented on ; *Hayne v. Maltby*, 3 T. R. 438, and *Faxton v. Dodge*, 37 Barb. (N. Y.) 84, distinguished.

Clute and Williams, for the plaintiffs.

Cassels, Q.C., and *Burdett*, for the defendant.

[11TH JUNE, 1886.]

WORTS v. WORTS.

Will, construction of—Power to make advances—Discretion—Board of executors and trustees—Binding majority.

J. G. W. by his will provided for the payment of annuities out of his estate for a period of ten years after his death, and then proceeded as follows: "the residue of the income arising from my said estate to increase and accumulate for the said period of ten years . . . I empower my trustees to make such advances from time to time . . . as they my trustees in their discretion may deem advisable out of the principal or income of the share of such . . ." and by a codicil, he further provided "that the power to make advances in the eleventh clause of my will shall be limited to income only and there shall be no power to make any such advance out of the principal."

Held, that the trustees had power to make advances without ascertaining the reason therefor, and that such advances were restricted to the accumulated income of the estate, but that each year's advances were not restricted to the accumulated surplus income of that year.

The will also declared "that any act done . . . by a majority of my trustees shall be deemed . . . the act . . . of all my trustees . . . and shall be binding upon all of them and upon all persons claiming under this my will . . . and that my said trustees shall form a board, of whom W. H. B. shall be chairman . . . and each of my said trustees shall have one vote with the exception of W. H. B., who shall have two votes, one equal with the other trustees . . . and another or casting vote whenever by his first vote the votes . . . are equal in number.

Held, that a majority of the *whole board* should bind the minority and all persons claiming under the will.

Lash, Q.C., for the plaintiffs the executors and trustees.

Robinson, Q.C., Moss, Q.C., and Bain, Q.C., for the beneficiaries.

J. K. Kerr, Q. C., and Davidson, for the infants.

IN CHAMBERS.

[BOYD, C., 15TH JUNE, 1886.]

In re MONTEITH ; MERCHANT'S BANK v. MONTEITH.

Costs—Appeal—Administrator—Creditors—Rule 544.

Costs of appeals are not carried by the words "costs of suit as between solicitor and client," but require to be specially mentioned in the order for taxation. The administrator is a necessary party to an administration suit, and as such should get his general bill of costs incurred in the ordinary proceedings in which he took part; but where an estate is insolvent the creditors are the persons really interested in the litigation, and it is for them, and not for the administrator, to take active steps by way of appeal to reduce the claims of the secured creditors. The administrator is entitled to attend upon the appeals and to tax a watching brief, but not such costs as if he were the principal litigant.

An appeal lies to a Judge in Chambers from the decision of the Master in Chambers under rule 544, upon appeal from a pending taxation.

Rae for the secured creditors.

J. A. Paterson, for the unsecured creditors.

MacGregor, for the administrator.

[GALT, J., 11TH JUNE, 1886.]

CONMEE v. CANADIAN PACIFIC RY. CO.

Staying trial—Interlocutory appeal.

The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, upon a question arising in the action as to the method of trial.

Osler, Q.C., for the plaintiffs.

R. M. Wells, for the defendants.

[1ST JUNE, 1886.]

McNAB v. OPPENHEIMER.

Sheriff—Poundage—Arrest—No money made on execution.

A sheriff upon arresting a judgment debtor under a *ca. sa.* thereby becomes at once entitled, as against the execution creditor, to full poundage on the amount of the execution.

Aylesworth, for the Sheriff of York.

Kappele, for the plaintiff.

[25TH JUNE, 1886.]

COCHRANE MANUFACTURING CO. v. LAMON.

Arrest—Ca. sa.—Discharge—Powers of local judge.

A local judge of the High Court has no power to order the discharge of a defendant held in custody under a *ca. sa.* issued out of the High Court.

Aylesworth, for the plaintiffs.

W. R. Meredith, Q.C., for the defendant.

[PROUDFOOT, J., 31ST MAY, 1886.]

BROWN v. COUSINEAUX.

Adding parties—Rule 109—Pleading.

In an action for the price of goods sold, C., to whom the defendant had paid the price of the goods, believing him to have a better title than the plaintiff, and J. C. F. and A. T., who were charged by C. with having fraudulently obtained possession of the goods, and made a pretended sale of them to the plaintiff; were added as parties defendant under rule 109, with a direction that C. should in his pleading state his case against J. C. F. and A. F., and that they should be at liberty to reply.

Shepley, for the defendant and C.

MacGregor, for the plaintiff.

[O'CONNOR, J., JUNE, 1886.]

BOSWELL v. GRANT.

Master in ordinary, jurisdiction of—Consolidating actions—Judgment.

The Master in Ordinary has no jurisdiction to consolidate actions in which the judgments have been entered and in which references are pending in his office.

E. H. E. Eddis, for the plaintiff.

Haverson, for the defendants.

REGINA *ex. rel.* WILSON v. DUNCAN.*Municipal Act, 1883—Controverted Elections—Master in Chambers, jurisdiction of.*

The Master in Chambers is not in any sense, by delegation or otherwise, a Judge of the High Court of Justice, to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted or disputed Municipal elections.

J. K. Kerr, Q.C., for the relator.

McMichael, Q.C., for the respondent.

[THE MASTER IN CHAMBERS, 27TH MAY, 1886.]

CAMPBELL v. JAMES.

Joinder of causes of action with claim for recovery of land—Rule 116—Time at which leave may be granted.

Where the writ of summons was endorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of a contract by the defendant to buy the land from the plaintiff, and, in the event of specific performance not being decreed, possession, &c., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by rule 116, and a motion was made to set aside the writ of summons and statement of claim, or one of them.

Held, that the causes of action were improperly joined in the statement of claim without leave, but, inasmuch as the two causes of action could not conveniently be separately prosecuted, leave was given *nunc pro tunc*.

Hoyles, for the plaintiff.

Shepley, for the defendant.

NEW BRUNSWICK.**In the Supreme Court.**

JORDAN v. THE GREAT WESTERN INSURANCE CO.

*Marine Insurance—Charter party—Loss of freight—Perils of the sea—
Voyage frustrated by ice—Peril insured against.*

The plaintiff, the owner of a vessel, effected insurance on her freight on 1st December, on a voyage from London to the Bay Chaleur; thence to Miramichi, and thence to Norfolk, Virginia, to load cotton for Liverpool. The policy was in the usual form, against perils of the sea, etc. On the 25th November—the vessel being then on her voyage from London—the plaintiff chartered her to persons in New York, and undertook that on her arrival at Miramichi she would sail direct to Norfolk, and there load for the charterers a cargo of cotton, and proceed therewith to Liverpool. The ship arrived at Miramichi on 25th November, and sailed therefrom for Norfolk on the 28th, and while proceeding on her voyage, ran into floating ice near the entrance to the river Miramichi, and being unable to get to sea, was taken to a place of safety, where she remained, frozen in, till the 7th May following. She could not, after that, have reached Norfolk before the 1st June.

The charterers on being informed in December, that the vessel was frozen in, notified the plaintiff's agent at Norfolk, that in consequence of this, they considered the charter at an end, and would ship the cotton by another vessel, and an indorsement to that effect was made on the charter-party, and signed by the agents of the plaintiff and charterers respectively; and the plaintiff afterwards acquiesced in this.

By the course of trade at Norfolk, no cotton sufficient for a cargo of the plaintiff's vessel, was shipped there between the 1st May and 1st October.

Held, per Palmer, King and Fraser, JJ., Wetmore, J., dissenting, (i) That the plaintiff having commenced the voyage, and incurred expense towards earning the freight, it was lost if his interest was destroyed by one of the perils assured against. (iii) That it must have been the intention of both parties to the charter that the vessel should reach Norfolk during the shipping season for cotton; and if it became impossible to do so, the object of the voyage was frustrated and the contract was at an end, and the freight was lost, the vessel not being bound, under the circumstances, to sail for Norfolk after being released from the ice. (iii) That the freezing in of the vessel was one of the perils insured against by the policy, and not one of the ordinary occurrences of navigation.

FURLONG v. RUSSELL.

Canada Temperance Act—Contract—Illegality.

A person who sells spirituous liquor, knowing that the purchaser intends to sell it in violation of law in a county where the Canada Temperance Act is in force, cannot recover the price of the liquor.

McNAIR v. STEWART.

Action for loss of a scow—Evidence of negligence—Expert testimony.

In an action for loss of a scow used in conveying deals to a ship lying in a harbor, it appeared that the scow in question, with two others, was fastened to the ship and broke adrift during a gale of wind, and was lost.

Held, that a witness could not be asked, for the purpose of proving negligence, "whether it was good or bad management for the defendant to have three scows fastened to the ship at the same time;"—the question not being a matter of science, art or trade.

WHITE v. RILEY.

County Court Act, sec. 44—Marriage of female plaintiff—Abatement of suit—Action against executors—Affidavit of debt—Con. Stat. cap. 52, sec. 19—Pleading.

An action brought in a County Court by a female does not abate by her marriage.

Quære, whether the omission of a creditor to make an affidavit of a debt claimed against an estate, under Con. Stat. cap. 52, sec. 19, is a defence to a suit against the executors. If so, the executor must plead it.

Marshall v. Armstrong, 21 N. B. Rep. 102, followed.

THE CANADIAN LAW TIMES.

VOL. VI.

SEPTEMBER, 1886.

No. 11.

CONSOLIDATION OF MORTGAGES.

THE equitable rule as to the consolidation of mortgages in its simplest form may be stated thus:—Where a mortgagor has mortgaged more than one estate by two or more mortgages which are held by the same mortgagee to secure different debts, he shall not against the will of that mortgagee be entitled to redeem one of the mortgaged estates without redeeming all.

The rule is of value to the mortgagee who has made an advance upon an insufficient security in a case where he then holds, or afterwards procures another mortgage from the same person upon another property which is sufficient to pay off the amount charged thereon and leave a surplus.

Foundation of the doctrine.—The equitable doctrine of consolidation is but an instance of the application of the maxim that “He who seeks equity must do equity.”

“The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the Court of Equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor. At law, independently of a legal estate, when the power of redemption given by original contract is gone, then a person comes into equity to have assistance from the Court of Equity and asks to redeem upon what are called equitable considerations, and then the Court of Equity

says :—‘ This is the price upon which we give you the relief you seek, namely, on your paying all that is due.’ Then the converse of that, where a mortgagee comes with a bill of foreclosure is no extension of that ; because a bill of foreclosure (it is an action now) never gave and never was intended to give the mortgagee any active remedy. A bill of foreclosure in substance was this : ‘ You have a right to redeem and you may exercise that right at any time within twenty years, according to the usual practice of the Court, but I do not want to be kept in a state of uncertainty as to whether I am to be redeemed or not, and therefore if you want to redeem me, redeem me now ’ ; and the mortgagee has a right to say, ‘ Redeem me upon these terms upon which you would be entitled to redeem if you filed your redemption suit.’ That is all. If you do not redeem your equity of redemption is gone ; the only result, therefore, of a bill for foreclosure is to deprive a man of his opportunity of filing a bill of redemption at some future time ” (a).

A mortgagor, therefore, either when seeking redemption in an action for that purpose, or when availing himself of the opportunity for redemption which is afforded him in a foreclosure action, is seeking or availing himself of a privilege which the Court of Equity extends to him, not as a matter of right but as a means of doing justice between the parties ; and whenever the Courts of Equity give relief, not as a matter of legal right, but by virtue of their purely equitable jurisdiction, they take care to so mould their judgments as to do complete justice to all parties interested, and one of the general rules adopted by the Courts of Equity in the exercise of this jurisdiction as the price of their extending equitable relief to the mortgagor, is the rule as to a mortgagee’s right to consolidate his securities, which is above set forth.

This being the foundation of the rule it is clear that the rule will be in no case enforced against a mortgagor when he is simply relying on his legal rights and is not seeking

(a) *Cumming v. Fletcher*, 14 Chy. D. at p. 708 ; and see *Mills v. Jennings*, 13 Ch. D. at p. 646.

or availing himself of any equitable remedies. If, therefore, there be two mortgage securities made by the same mortgagor, and default has been made on one of them, but not on the other, so that the mortgagor as to that other still retains his legal right of redemption, it follows that the rule as to consolidation will not be enforced against such mortgagor. Before that rule can be enforced against him default must be made with respect to all the securities as to which consolidation is sought (b).

Extension of the Rule.—The rule applies as well to foreclosures as to redemptions (c), the reason for which we have explained above.

The rule may be taken advantage of as well by a subsequent incumbrancer brought into the Master's office as by a plaintiff or defendant at the trial. Thus, where an action was brought upon a mortgage and it was referred to the Master in the usual way to take accounts and add subsequent incumbrancers as parties in his office, it was found by the Master that there was a subsequent mortgagee, and he was accordingly made a party defendant, and as such proved his claim in the Master's office upon his mortgage on the property in question in the action, and it was held that he was also entitled to prove his claim upon another mortgage held by him from the same mortgagor upon another property, and to insist upon being redeemed as to both mortgages, if the mortgagor desired to redeem as to either of them (d).

The rule, moreover, is not confined to the simple case stated, but, *apart from the modifications effected by the Registry Act*, applies although the first mortgages of several estates were originally made to several mortgagees, but have by transfer come into the hands of one mortgagee, and is enforced not only as against the mortgagor but also as against all persons deriving title from the mortgagor to all or any part of the mortgaged properties (e).

(b) *Cumming v. Fletcher*, 14 Ch. D. 699.

(c) *Watts v. Symes*, 1 De G. M. & G. 246; *Johnston v. Reid*, 29 Gr. 293.

(d) *Ross v. Stevenson*, 7 P. R. 126.

(e) *Beever v. Luck*, L. R. 4 Eq. 537; *Vint v. Padget*, 2 De G. & J. 613; *Selby v. Pomfret*, 1 J. & H. 336, aff'd on appeal, 3 De G. F. & J. 595.

A further extension of the rule is that where the mortgagee has sold one of the mortgaged securities under his power of sale and has realized a surplus after paying off the debt secured by the mortgage containing the power of sale, he is entitled to retain this surplus and consolidate it with another mortgage held by him upon another property made by the same mortgagor (*f*).

The doctrine of consolidation was at one time extended in England to such a point as to do great injustice to subsequent mortgagees and purchasers of equities of redemption.

Thus, in *Vint v. Padget* (*g*) there were two estates belonging to the same owner and subject respectively to two distinct mortgages vested in different mortgagees. The equity of redemption in these two estates was subsequently conveyed by way of mortgage to a second mortgagee, and then the two first mortgages were assigned to one person who at the time of taking such assignment had notice of the subsequent mortgages. In a foreclosure action brought by the assignee of the first mortgages against the second mortgagee it was contended on behalf of the defendant that when he advanced his money the prior mortgages were in different hands and he might have redeemed either of them without the other, and that the plaintiff took his assignment with notice of this right, and therefore could not prejudice it by uniting the two first mortgages in himself and claiming to consolidate them. It was, however, said by the Court that "It is immaterial whether, when a transferee of two mortgages on different estates buys or acquires these mortgages he has or has not notice of any subsequent mortgage. The second incumbrancer in this case must be deemed to have taken his security with knowledge that the two mortgages on the two estates, though then belonging to different mortgagees, might coalesce, and with the knowledge of the possible consequences of their coalition." The result was that the plaintiff was held entitled to consolidate.

(*f*) *Selby v. Pomfret*, 3 De G. F. & J. 595.

(*g*) 3 De G. & J. 611.

So also in *Beevor v. Luck* (h) a similar hardship was inflicted by the application of the doctrine in question. In that case it was held that a purchaser of an equity of redemption from the mortgagor will not be permitted to redeem his estate without also redeeming all other mortgages by the same mortgagor which have become united in the plaintiff, whether such union has taken place before or since the purchase, and whether the purchaser may or may not have had notice of the existence of the other mortgages.

These inequitable extensions of the rule were however happily disapproved of by the House of Lords in *Jennings v. Jordan* (i), and subsequently by Mr. Justice Fry in *Harter v. Colman* (j), so that their authority is now very much weakened if indeed it is not entirely overthrown.

Limitations of Rule.—Consolidation cannot be insisted upon if the equity of redemption of one of the mortgaged estates has been sold or mortgaged *previous to the transfer* which brings the two mortgages to the same hand (k), or if such sale or mortgage takes place *previous to the creation of the second mortgage* with respect to which consolidation is claimed (l).

In *Mills v. Jennings* (m) it is said by Lord Justice Cotton in delivering the judgment of the Court of Appeal: “As a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply, even though one of the mortgages which it is sought to consolidate was not created

(h) L. R. 4 E. 537.

(i) 6 App. Cas. 698.

(j) 19 Chy. D. 630.

(k) *Harter v. Colman*, 19 Chy. D. 630.

(l) *Mills v. Jennings*, 13 Chy. D. 639; affirmed on appeal, *sub nom. Jennings v. Jordan*, 6 App. Cas. 698.

(m) 13 Chy. D. at 646.

till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion, independently of authority, this contention cannot prevail. It seeks to affect in equity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent Act of his vendor. That this will be the result will appear from considering from what Acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate as soon as the second mortgage is created a right to get both the mortgages into his hands, and to hold both until the debt due on each is paid. The principle which allows as against a subsequent purchaser or mortgagee the right of consolidation is that the mortgagor cannot by any dealing with the equity of redemption prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of the estate. It is true that a mortgagee of one estate may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give

rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate there can be no consolidation of a mortgage subsequently created on another estate."

The same principle was applied in *Harter v. Colman* (n), where Mr. Justice (now Lord Justice) Fry says: "Taking the case of an assignment of an equity of redemption, must the assignee of the equity of redemption do all such equities as his assignor would have been liable to at the time when the redemption action was brought, or must he perform, and hold subject to, those equities only to which his assignor was liable at the date of the assignment? If it be the former, the assignee of the equity of redemption of one of the estates would be in no better position than the assignor, if he had remained the owner of both of the equities of redemption. If, on the other hand, the assignee takes subject to those equities only which were subsisting against his assignor at the time of the assignment of the equity of redemption, he will be in a better position than the assignor, because the union of the two mortgages in the case supposed takes place subsequently to the assignment, and the equity which arises from the union, therefore, originates subsequently to the assignment. * * * I may refer by way of analogy to the case which I mentioned in the course of the discussion, *Watson v. Midwales Railway Company* (o), as illustrating what I understand to be the rule applicable to the assignment of *choses in action*, viz., that the assign of a *chose in action* takes it subject to all equities subsisting at the time of the assignment, and not to the equities which arise subsequently, and which did not exist at that time."

In *Re Walhampton Estate* (p) the facts were that A. executed a voluntary settlement of Blackacre, and then mortgaged it in fee to B. He afterwards mortgaged Whiteacre

(n) 19 Chy. D. at p. 633.

(o) L. R. 2 C. P. 593.

(p) 26 Chy. D. 391.

to C., and that mortgage became vested in B., who claimed the right to consolidate as against the persons claiming under the voluntary settlement. Mr. Justice Kay in giving judgment said "I consider the claim for consolidation on the part of the mortgagees to be utterly unfounded. It is true that the voluntary settlement is void as against the subsequent mortgagee to the extent of the mortgage. But because that mortgagee afterwards obtains from the mortgagor another security is he to be allowed to consolidate his two securities, so as to throw on the estate, subject to the settlement, any part of the sum which may be owing to him beyond that originally charged thereon? In my opinion he clearly cannot do so. The Statute of Elizabeth gives him no such power. It makes a voluntary settlement fraudulent and void as against a subsequent purchaser, but it only makes it void to the extent of the purchaser's interest therein. No authority has been cited which bears out the contention of the mortgagees in this case, and I therefore hold that the settled estate is liable only to the extent of the sums charged thereon by the the mortgages expressly affecting it."

Notwithstanding the contrary decision in *Bevor v. Luck* (q), Lord Justice James in delivering judgment in *Cumming v. Fletcher* (r), expressed a strong opinion that there can be no consolidation of a mortgage made by A. for his own debt, with a mortgage made by A. and B. of other property for their partnership debt.

The tendency of the Courts has of late years been to restrict the application of the equitable rule as to consolidation of mortgages. Various judges have expressed the opinion that the rule should be in no way extended. This opinion has been expressed by Vice-Chancellor Hall in *Baker v. Gray* (s); Thesiger, L.J., in *Cumming v. Fletcher* (t); James, L.J., in *Re Raggett* (u); and Lord Blackburn in *Jennings v. Jordan* (v).

(q) L. R. 4 Eq. 537.

(r) 14 Chy. D. at p. 710.

(s) 1 Chy. D. at p. 496.

(t) 14 Chy. D. at p. 716.

(u) 16 Chy. D. at p. 119.

(v) 6 App. Cas. at p. 719.

Effect of Registry Act.—The doctrine of consolidation is in no way affected by that provision in the Registry Act which abolishes tacking (*w*). Tacking is a very different thing from consolidation. The doctrine of tacking applies where there are *three or more* incumbrancers upon the same property, while the doctrine of consolidation applies, as we have seen, where there are *two or more* incumbrancers upon separate and distinct properties. The right to tack, moreover, arises only where the person seeking to enforce the right, having acquired a *puisne* incumbrance without notice of *mesne* prior incumbrances, succeeds in procuring a conveyance to himself of the legal estate and relies upon the maxim that where the equities are equal the law must prevail; while the doctrine of consolidation, as we have seen, rests upon the maxim that he who seeks equity must do equity.

The holder of several mortgages, against several parcels of land, whether registered or unregistered, cannot consolidate his securities as against the subsequent mortgagee or purchaser of the equity of redemption of one of the mortgaged parcels, who has registered his mortgage or conveyance, without notice of the prior mortgages on the other parcels (*x*).

The holder of several registered mortgages against several parcels of land will, however, be entitled to consolidate his securities as against a subsequent mortgagee or purchaser of *all the parcels*, since the latter has in such a case, by notice of the Registry Act, taken his title with notice of the first mortgagee's equitable right to consolidate his securities (*y*).

A mortgagee may, moreover, consolidate as against an execution creditor of the mortgagor because the latter takes only the interest which his debtor had, and he takes it subject to all equities; but if such creditor has obtained

(*w*) *The Dominion Savings Society v. Kittridge*, 23 Gr. 631.

(*x*) *Brower v. Canada Permanent L. & S. Co.*, 24 Gr. 509; *Miller v. Brown*, 3 O. R. 210.

(*y*) *Dominion Savings Society v. Kittridge*, 23 Gr. at p. 635; but see *Johnston v. Reid*, 29 Gr. at pp. 296 and 297.

and registered a subsequent mortgage of one of the estates as security for his judgment debt without notice of the several securities held by the prior mortgagee, there can be no consolidation as against him provided that further time for the payment of the antecedent debt has been given as a consideration for the making of the mortgage to the execution creditor (z).

Thus we see that although the Registry Act does not affect the doctrine of consolidation as between the mortgagor and mortgagee, or as between the mortgagee and any other persons who are not entitled to claim the protection of the Registry Act, yet it does materially affect it as between the mortgagee and persons claiming under the mortgagor either as purchasers or *puisne* mortgagees who have registered the instruments under which they claim, and are entitled to the protection of the Registry Act.

Practice.—It may be useful to add a few words as to the proper practice to be adopted by a mortgagee who desires to bring an action for foreclosure or sale upon one of his mortgage securities, and desires at the same time to consolidate the said mortgage with some other security held by him from the same mortgagor. The proper practice in such a case is for the mortgagee to endorse his writ for foreclosure or sale, as the case may be, and for consolidation, and to include in his endorsement a description of the land covered by both mortgages. He may then register a *lis pendens* and proceed with his action as in a case for ordinary foreclosure, and may under the ordinary mortgage judgment effect the consolidation in the Master's office (a).

A. H. MARSH.

(z) *Johnston v. Reid*, 29 Gr. 293.

(a) *Gemmell v. Rochester*, decided by Proudfoot, J., 16th Nov., 1881, not reported.

THE ANGLO-AMERICAN EXTRADITION TREATY.

(From the Law Journal.)

“Whereas by article 10 of the treaty concluded between the United States and Her Britannic Majesty on August 9, 1842, provision is made for the extradition of persons charged with certain crimes; and whereas it is now desired by the high contracting parties that the provisions of the said article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said article and in this convention, the said high contracting parties have appointed their plenipotentiaries to conclude the convention for this purpose—namely, the President of the United States, Mr. Edward J. Phelps, Envoy Extraordinary of the United States to the Court of St. James, &c., and Her Majesty the Queen of the United Kingdom, the Right Honourable Archibald Philip, Earl of Rosebery, Her Majesty’s Principal Secretary of State for Foreign Affairs, &c., who, after having communicated to each other their respective full powers in good and due form, have agreed upon the following articles:—

“Article 1.—The provisions of article 10 of the said treaty are hereby extended to apply to and comprehend the following additional crimes not mentioned in the said article—namely, (1) manslaughter, (2) burglary, (3) embezzlement or larceny of the value of 50 dols. or £10 and upwards, (4) malicious injuries to property whereby the life of any person shall be endangered, if such injuries constitute a crime according to the laws of both the high contracting parties, and the provisions of the said article shall have the same effect with respect to the extradition of persons charged with any of the said crimes as if the same had been originally named and specified in the said article.

“Article 2.—Provisions of the 10th article of the said treaty and of this convention shall apply to persons convic-

ted of the crimes therein respectively named and specified whose sentences thereupon shall not have been executed. In the case of a fugitive criminal alleged to have been convicted of a crime for which his surrender is asked, a copy of the record of conviction and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with evidence that the prisoner is the person to whom such sentence refers.

“ Article 3.—This convention shall not apply to any of the crimes herein named and specified which shall have been committed, or to any convictions which shall have been procured, prior to the date when the convention shall come into force.

“ Article 4.—No fugitive criminal shall be surrendered under the provisions of the said treaty or of this convention if the crime in respect of which his surrender is demanded be one of a political character, or if he prove to a competent authority that the said requisition for his surrender has in fact been made with a view to try or punish him for a crime of a political character.

“ Article 5.—A fugitive criminal surrendered to either of the high contracting parties under the provisions of the said treaty or of this convention shall not, until he has had an opportunity of returning to the State by which he has been surrendered, be detained or tried for any crime committed prior to his surrender other than the extradition crime proved by the facts on which his surrender was granted.

“ Article 6.—The extradition of fugitives under the provisions of the said treaty and of the present convention shall be carried out in the United States and in Her Majesty's dominions respectively subject to and in conformity with the laws regulating extradition for the time being in force in the surrendering State.

“ Article 7.—This convention shall be ratified, and the ratifications shall be exchanged in London as soon as possible. It shall come into force ten days after publication, in conformity with the forms prescribed by the laws of the

high contracting parties, and shall continue in force until one or other of the high contracting parties shall signify a wish to terminate it, and no longer.

“In witness whereof the undersigned have signed the same and have affixed thereunto their seals.

“Done at London, June 25, 1886.

“EDWARD JOHN PHELPS.

“ROSEBERY.”

EDITORIAL REVIEW.

Mortgages and the Statute of Limitations.

At page 409 of volume 4 of this Journal will be found a contribution on the effect of the Statutes of Limitation upon the estate of a mortgagee. The questions there discussed have been before the Judicial Committee of the Privy Council in a case of *Lewin v. Wilson*, on appeal from the Supreme Court of Canada. The facts of that case are as follows:—On the 27th September, 1850, John Howe and James White gave a joint and several bond to secure the payment of £1,000 to Margaret Cunningham on the 27th September, 1855, with interest quarterly until payment of the principal. As between Howe and White the latter was a surety, but they were both principal debtors to the obligee. On the same day each of them mortgaged some property to the obligee to secure the bond debt. White's mortgage was made upon the express condition that if he and Howe or either of them their or either of their heirs, executors or administrators should pay to Miss Cunningham or her representatives the sum of £1,000 on the 27th September, 1855, with interest in the meantime according to the condition of the bond of even date, the mortgage deed was to be void, otherwise to remain in full force and virtue. A similar proviso for defeazance was contained in Howe's mortgage, the only difference being that Mary, the wife of Howe, was introduced as a party entitled to pay the debt.

The interest on the debt was paid regularly by Howe up to the 27th March, 1879, after which his payments ceased. On the 20th January, 1881, Miss Cunningham's repre-

sentatives commenced a suit for foreclosure and sale of the property comprised in both the mortgages. The defendants in the suit were the successors in title of White, and they set up the statute of limitations. The question was whether the payments of interest made by Howe prevented time from running in favour of White. The cause was heard before Mr. Justice Palmer, Judge in Equity (New Brunswick), who considered that White's property was protected by lapse of time, and dismissed the bill with costs as against the defendants claiming under him. As regards Howe's mortgage he made a decree for sale. The plaintiffs then appealed to the Supreme Court of Canada against the dismissal of their bill, and as the majority of that Court agreed with Mr. Justice Palmer upon the point of limitation, the appeal was dismissed with costs.

Their Lordships of the Judicial Committee, reviewing the transaction, held that the three deeds were parts of a single transaction; because, without resorting to extrinsic evidence, each mortgage deed referred to the bond in such terms as to incorporate it into the proviso for redemption. Hence by the express contract of the three Howe was bound to pay, and Miss Cunningham was bound to receive the money due on the bond. By the same contract a tender by Howe of money according to the condition of the bond would be a good tender to defeat and avoid White's mortgage.

Mr. Justice Strong, who dissented from the majority of the Supreme Court, held that Howe was the agent of White to make the payments. While their Lordships did not express any opinion to the contrary, they placed their judgments upon the broad ground that the payments having been made by a person who under the terms of the contract was entitled to make a tender, and from whom the mortgagee was bound to accept a tender of money were payments within the meaning of the Real Property Limitation Act, and gave a new starting point from which time had to run. The judgment of the Supreme Court was therefore reversed.

Trustee purchasing Trust estate.

We collected some cases on this point, 3 C. L. T. 415, at which place the decision of Fry, J., in *Coaks v. Boswell* (L. R. 23 Ch. L. 302) upon the position of a trustee who had obtained the leave of the Court to bid was referred to as expressing the true state of the law.

The decision was reversed by the Court of Appeal (L. R. 27 Ch. D. 424), but restored by the judgment of the House of Lords (L. R. 11 App. Ca. 232). The case raised the important questions of the duty which a person in a fiduciary position owes to the Court when offering himself as purchaser of the trust estate, the extent to which he is bound to inform the Court upon the advantages to be derived from the purchase, and his position when the leave to bid has been granted.

The Court of Appeal held that such a purchaser must either abstain altogether from laying any information before the Court in order to obtain its sanction to the purchase, or must lay before it all the information he possesses which it is material the Court should have to enable it to form a judgment on the subject under its consideration. As a general proposition the House of Lords holds this to be too broadly expressed. Lord Fitzgerald, who all but dissented, stated the true rule most concisely, as follows:—
“If he professes to give the Court information on any particular subject with a view to guide its discretion and obtain its approval of the proposed sale, he is bound to lay before the Court all the material information he possesses on that particular subject.” No deceit can be implied from mere silence as to certain facts unless the purchaser undertakes or professes to communicate them to the Court. The conclusion to be drawn from this decision is that the purchaser may maintain a strict silence as to all information. If he is asked for information upon any particular point, and he undertakes to inform the Court, he must give full information; but, inasmuch as he may keep silent altogether, we presume he may refuse to give information in answer to a particular point, though asked

for it. His refusal, be it observed, may induce the Court to withhold leave to bid in the first place, but after the leave is granted and the contract has been made, his silence, as we shall see, is not ground for rescinding the contract.

Another very material point is mentioned by Lord Selborne in his judgment. The purchaser gave information to the vendor's solicitor which, it was suggested, was not communicated to the Judge who gave the leave to bid. That was not established in evidence, but Lord Selborne said, "In the absence of any improper collusion between the purchasers and Mr. Brown [the vendor's solicitor], or at least clear notice that Mr. Brown was neglecting his duty, I am of opinion that the purchasers were not bound to watch or suspect the solicitor of the vendor, or to interfere between him and the chief clerk or the Judge, for the purpose of seeing that all material communications made to him were brought to the personal knowledge of the Judge."

When the leave to bid has been granted to a person occupying a fiduciary position he is put in the position of a stranger. Upon this point Lord Selborne says, "Upon the other point I agree with Fry, J. The leave to bid put an end to Mr. Coaks' disability to purchase on account of his mere position as solicitor on the record for the executor, or as interested in the plaintiff Lacey's costs of the suit." And again, "The question is not, whether the Court did what was best and wisest for the benefit of Sir Robert Harvey's creditors, but, whether the purchasers obtained their bargain by means of any malpractice or fraud. They had a right to get the best bargain they could, provided they did it honestly, without the use of any improper means, or failure of any duty incumbent on them. It appears also from the report that their leave extended to a private purchase after a sale by auction had failed.

A Body, but no Soul.

The old aphorism that a corporation has neither body to be kicked nor soul, etc., has again come to the surface in a case of *Abrath v. N. E. R. Co.*, L. R. 11 App. Ca. 247.

It is true, of course, that you cannot get at a corporation in order to kick it; for when so minded you must either select a representative of the corporation or pay your attentions to all the shareholders. And it does not follow that any official of the company may be content to receive the kicking in his corporate rather than in his individual capacity; nor the whole body of shareholders either, for that matter, even though they might be in general meeting assembled. And as to the directors and other officers, *non constat* that they represent the company for such a purpose, or that the company would be bound by their suffering. But you may draw the company's life blood, which is money, and demonstrate to them that though they have no corporal capacity to undergo punishment they have a corporate existence which may be weakened by loss of blood. And when wounded sore they turn in anger to rend their enemy, and grasp the deadly weapon of a criminal prosecution with intent to ruin him, the law says they are incapable of any feelings of revenge, anger or malice. They simulate the passions and do unconscientious acts, and when you put them on their defence they say our revenge, anger and malice are *ultra vires*; our charters did not grant us the passions. We do unconscientious acts because we have no consciences; and because we have no consciences you cannot convict us of unconscientious acts.

Special Conveyancing.

The *Law Journal* attributes to the *Courier Journal* the following:—"A Justice of the Peace, in a rural district of Georgia, in the habit, in the absence of regular lawyers, of transacting professional business for his neighbours, on one occasion was employed to draw a marriage settlement. The estate was limited to the use of the bride during her life, 'and at and after her death to any child or children she may have by the said Thomas Smith (the bridegroom), his heirs, executors, administrators, or assigns.'" 'What do you think of it?' asked Smith of a lawyer to whom

he showed the document. 'I think,' answered the lawyer, 'that whoever drew this deed was determined that there should be no trouble by reason of failure of issue.'"

The Justice must have been in some way connected with the student who, in answer to the question, Why is it necessary to go back sixty years in making an abstract of title? answered, To allow for the period of gestation.

BOOK REVIEWS.

An Essay on Obligations; for Lawyers, Students, and Laymen. By JOSEPH K. FORAN, LL.B. Toronto: Carswell & Co. 1886.

This book of 160 pages is intended as a condensation of the law of Obligations as exhibited in the Civil Code in Quebec. There is, we believe, no work written in the English language which covers the same ground, and to any one desiring to acquire elementary instruction in this branch of law as established by the Code we recommend the book. It is logical in its treatment of the subject; written concisely—perhaps too much so for one not versed in the technical language of the Civil Code; and refers to authorities which may be consulted for more extensive research.

The subject is treated as follows:—The existence of an obligation; The sources of obligation, and their effects; The different kinds of obligations; Extinction of obligations. As a compact and easily attainable statement of the civil law on obligations, it might be consulted with advantage by students of English law for the purpose of comparing the civil law with our own.

The Rule against Perpetuities. By JOHN CHIPMAN GRAY, Royall Professor of Law in Harvard University. Boston: Little, Brown & Co. 1886.

Mr. Gray has necessarily a small constituency—not on account of his subject so much as on account of its abstruseness. We do not pretend to have read the work through. A glance at its arrangement, followed by a perusal of such

parts as deal with the more familiar portions of the law, is all that the book has received at our hands. The learned writer, in a series of cases chronologically considered, gives the origin and history of the Rule ; and subsequently treats of limitations in detail. He also gives a chapter upon future interests, and one upon vested and contingent interests. The work, we think, is one of the ablest of the productions of American authors.

CORRESPONDENCE.

Jurisdiction of County Court Judges.

Editor of the CANADIAN LAW TIMES:

SIR,—The point referred to in Vol. 3 of the CANADIAN LAW TIMES, page 81, as likely to arise for decision, came before the Supreme Court of Nova Scotia, in a case of which I have just received the proof sheets. The County Court Act of 1874 cap. 18, afterwards re-enacted with amendments, provides in section 10, that in the event, *inter alias* of the County Court Judge of one district being disqualified, he may call in and designate the Judge of any other County Court to act in his stead. The Act for the trial of controverted elections of Municipal Councillors, 1881, cap. 1, sec. 14, provides that the trial of every election petition shall be conducted before the Judge of the County Court in the district in which the election was held, or the Judge presiding in his stead for the reasons mentioned in the Act first referred to. Judge Blanchard, who was the Judge for the district in which the election was held, was disqualified by relationship from acting, and called in Judge Morse from the County of Cumberland. On the day before the trial was to have been commenced before Judge Morse, the respondents had the cause removed by *certiorari* on the ground that that Judge's commission did not extend to the County of Colchester, in which he proposed to try the petition. The view presented in your editorial and in the dissenting opinion of Armour, J., in *Wilson v. Maguire*, 2 Cart. 665, was urged by Counsel for the defendant, but failed to convince their lordships, who, at the close of the argument, pronounced the following judgment:—

MCDONALD, C.J. (July 21st, 1885), delivered the judgment of the Court:—

“ We are all of the opinion that it will not be necessary to call upon Mr. Russell. In giving my own judgment I confine my opinion to one point. I will not now discuss the question raised as to whether a designation, such as we have in this case, of a Judge for the ordinary civil proceedings of the County Court would be *ultra vires* or not, but I have no doubt as to the power of the Local Legislature to provide for and appoint an election Judge. It was admitted throughout the argument that this power existed to the fullest extent. The question then is, was there, in the statutes which we have been discussing, an appointment and induction of a Judge in a legal and constitutional manner to try this election petition. I think there was. I think, admitting that the appointment by Judge Blanchard, in an ordinary civil cause, would be *ultra vires*, the description in the Act of 1881, of the Judge to try this municipal election petition, was amply sufficient to give Judge Morse jurisdiction under the circumstance shown by the evidence.

McDONALD, J.—I think that the question of the commission does not enter into the case at all, except as proving that the appointment was within the sphere of the power of Mr. Blanchard, as County Court Judge. The Legislature might have empowered Judge Blanchard to appoint any person whom he pleased, because it is not within the jurisdiction of the County Court, generally, and the commission is only important to show he did not go beyond the limits of the Act, and that the party whom he did appoint was a County Court Judge. If the Act had enabled him to designate the Prothonotary it would have been the same thing.

WEATHERBE, J.—I think the fallacy of the respondent's argument was in basing it upon the commission as if the appointing power could limit the district for which the Judge was to sit, whereas the legislature alone can define the district, and enlarge and extend it as it sees fit.

THOMPSON, J.—I think that the legislature, which had power to constitute and organize the Court, had, likewise, power to change the constitution of the Court, both as to subject matter of jurisdiction and as to the area over which

jurisdiction should be exercised. It had power as ample with respect to the area as with respect to the subject of jurisdiction, and the expressions cited from the commission are to be taken not as limiting the jurisdiction either as to subject matter or as to area, but as being only descriptive of the tribunal over which the Judge is appointed to preside."

Yours &c.,
G.

REVIEW OF EXCHANGES.

Albany Law Journal.—27th February, 1886.

Mandamus in Election Cases, by ED. J. MAXWELL. Where there is an adverse claimant to an office, the proper remedy to determine the validity of his title is *quo warranto*. Where no such claimant exists, *mandamus* must be resorted to. The article treats of the employment of the latter writ in dealing with election officers, tellers and boards of canvassers.

Ibid.—6th March, 1886.

Survival and Abatement of Actions, by GUY C. H. CORLISS. Continued in the following number. The purpose of the article is to discuss the exceptions which have been established by judicial decision to the general rule that actions *ex contractu* survive, and actions *ex delicto* do not survive.

Ibid.—27th March, 1886.

The Effect of a Deed of Release or Quit-Claim, by CHARLES C. MARSHALL. The question is determined, in many States, by statute, and cases under such statutes are referred to. "It may be said that the Courts of New York, in construing the force of a quit-claim deed, have never clearly gone a line further than the Court of Appeals in *Lynch v. Livingstone*, 6 N. Y. 422, where the decision was that "the words *remise*, *release* and *quit-claim*, in a deed to one not in possession, where an intent to convey the estate of the grantors is recited, and a pecuniary consideration appears, are effectual as words of bargain and sale." For the opinion of an Ontario Court upon this subject, see *Nicholson v. Dillabough*, 21 U. C. R. 591, and *Cameron v. Gunn*, 25 U. C. R. 77. Whether the releasee under such deed can be considered a *bona fide* purchaser without notice as contemplated in registry laws is also considered. See *Goff v. Lister*, 14 Gr. 451.

Ibid.—10th April, 1886.

Common Words and Phrases. Volatile Substances, Tide-lands, Workman, Spirituous liquor, Lewd and rude cohabitation, are defined.

Ibid.—1st May, 1886.

Common Words and Phrases. Lease, Rent, Money won at any game, High-water mark, Inland navigation, River, Drunk, Stock, Habitual drunkard, are defined.

Ibid.—22nd May, 1886.

Life Tenant and Remainderman, by GUY C. H. CORLISS. Deals with the relative rights and duties of these parties, where interested in the same estate, in respect of taxes, incumbrances, interest upon charges, estovers, insurance premiums, etc. Very numerous authorities are collected.

American Law Review.—May-June, 1886.

Codification. Papers by Mr. JUSTICE MILLER, and JUDGES WEATHERS and COOLEY in continuation of the discussion upon this subject. Mr. Miller favours codification, the others urge objections to it. Mr. Cooley remarks upon the danger, likely to be experienced, of the appointments to commissions for framing a code being based upon political grounds rather than those of peculiar ability or fitness for the task. He apprehends that codification may eventually be brought about by the constant encroachment of statutory law upon the domain of common law. When in time the larger portion of the law is in statutory form, it may be found convenient that all should be. These articles are among the best that have recently appeared upon the subject.

Special Interrogatories to Juries, by W. W. THORNTON. The distinction between special findings or interrogatories and a special verdict is pointed out and explained, as well as what are proper and what are improper and insufficient answers to such interrogatories. The practice is, in many of the States, governed by special statute.

Privity of Estate, by JOHN R. McFEE. The subject is treated very fully, first with regard to the law of covenants running with the land, and then with reference to estoppel. The remarks upon *Spencer's Case* and *Pakenham's Case* are worthy of careful attention.

Hints about Trials, by H. B. BROWN. These are notes upon the duty of a Judge in presiding at jury trials, being principally suggestions of methods for effecting more expedition in the conduct of such trials.

American Law Register.—April, 1886.

Investment of Trust Funds, by JOHN HOUSTON MERRILL. The strictness of the English law upon this question has not been approved in the United States. In Massachusetts it is, in some respects, expressly repudiated. The law in various states is examined and compared, and the conclusion reached that no accepted rule of universal application can be formulated. Where the trust deed, or settlement, is silent as to investment, recourse must be had to statutes governing the matter, attention being paid to their wording—whether directory merely, or absolutely limiting the discretion of the trustee. Outside of this, the ground is somewhat uncertain. Adverting to the dangers which beset a thankless office, the writer suggests that a more liberal construction should be given

to all powers of investment in trust instruments, and the requirement made only of such diligence, care and prudence as a careful man would exercise in his private affairs. The exposition given of the law in England, and the numerous cases collected, will be found of value.

Ibid.—May, 1886.

Actions by and against Receivers, by H. CAMPBELL BLACK. Questions of practice are dealt with, and the receiver's liability for torts of his employees touched upon.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.
COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 26th JUNE, 1886.]

IRELAND v. PITCHER.

*Action against magistrates—Costs, scale of—R. S. O. cap. 73, secs. 18 and 19
—Taxation—Appeal—Time—Rule 427.*

In an action against Justices of the Peace for false imprisonment, etc., the Divisional Court (10 Ont. R. 631), ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of Court might direct. Upon appeal from the taxation,

Held, Cameron, C.J., *dubitante*, that the effect of R. S. O. cap. 73, sec. 19, read in connection with section 12 of that Act, and with R. S. O. cap. 43, sec. 18, sub-sec. 5, R. S. O. cap. 47, sec. 53, sub-sec. 7, and R. S. O. cap. 50, sec. 347, is not to provide that the plaintiff should have costs on the Superior Court scale, when his recovery is within the competence of an inferior Court.

Per Cameron, C.J. The case came under section 18 rather than section 19 of R. S. O. cap. 73.

Held, also, that the action was within the proper competence of the Division Court, and the plaintiff should have costs only on the scale applicable to that Court, and the defendants should have their proper costs by way of deduction or set-off.

Appeals from taxations should be brought on within a reasonable time. Within eight days, the time limited for appeals under Rule 427, is a reasonable time.

Stark v. Fisher, 11 P. R. 235, and *Quay v. Quay*, 11 P. R. 258 approved of.

Aylesworth, for the appeal.

Beck, contra.

CHANCERY DIVISION.

[BOYD, C., 3rd JUNE, 1886.]

SWEET v. PLATT.

Will—Devise—Limitation to “offspring”—Life estate of ancestor—Misrepresentation—Execution of deed without consideration.

J. P. by his will provided as follows: “I give and devise to my brother D. P. the land on which he resides . . . to hold the same to the said D. P. for and during his natural life and after the death of the said D. P. I give and devise the said land to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring surviving him, then I give and devise the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I give and devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father’s lifetime, then I give and devise the same to . . .” D. P. & H. P. by conveyances and mortgages dealt in the land as if they were the owners in fee. After several mortgages to one J. E. who was H. P.’s solicitor were registered against it, and after D. P.’s death, J. E. having assured H. P. that his (J. P.’s) title to the land was perfectly good, and that H. P.’s children had no interest in it, persuaded H. P. as a matter of form to execute the power of appointment in favour of L. S. one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representations and without consideration, a quit-claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit-claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estate, it was

Held, that only a life estate was given to H. P., and not an estate in fee tail. If "offspring" is read as "children" or construed as meaning "issue," the devise falls within the rule that when words of distribution together with words which would carry an estate in fee are attached to the gift to the issue, their ancestor takes for life only. Here to the children or issue in default of appointment is given expressly an estate "in fee," and it is distributed to them "equally."

Held, also that untrue representations were made which rendered the execution of the power of appointment and the transfer of the estate thereunder without consideration, and that the instruments subsequent to the deed of appointment did not affect the fee simple of the land and that the operation of the mortgages should be limited to the life estate of H. P. in the land.

Foster, Q.C., and Clark, for the plaintiffs.

Moss, Q.C., for the defendants the executors.

Edminson, for Catherine E. Platt.

[PROUDFOOT, J., 16TH JUNE, 1886.]

PARTLO v. TODD.

Trade Mark and Design Act of 1879—Action to restrain infringement of registered trade mark—Prior user—Definition of trade mark.

In an action to restrain the infringement of a trade mark registered under the Trade Mark and Design Act of 1879,

Held, following *McColl v. Theall*, 28 Gr. 48, that prior user can be given in evidence to invalidate the trade mark.

Held, also, that the words "Gold Leaf," used in the plaintiff's trade mark, distinguished the flour made by the plaintiff from that made by any other person and as such was a proper subject of a trade mark within the language of section 8 of the Act.

Held, also, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well known and current name by which that article was defined and that there must be judgment for the defendant with costs.

Cassels, Q.C., and Jackson, for the plaintiffs.

Moss, Q.C., and G. W. H. Ball, for the defendants.

[FERGUSON, J., 29TH JUNE, 1886.]

KENNEDY v. THE CITY OF TORONTO.

Patent—Subject to condition—Trust—Rights of the Crown—Private Act—Provincial Legislature—Ordnance lands—Intra vires—Interpretation.

Certain ordnance land vested in the Crown was in 1858 patented to the Corporation of the City of Toronto, with the following clause in the patent, "Provided always and this grant is subject to the following conditions, viz.: "the land . . . shall be dedicated by the said Corporation, and by them maintained for the purposes of a public park for the use benefit and recreation of the inhabitants of the said City of Toronto for all time to come" The Corporation of Toronto in 1876, obtained from the Ontario Legislature an Act empowering them "to lease, sell, or otherwise dispose of" the said land, and one of their committees transferred it to another to be used as a cattle market, receiving a yearly rent therefor which they applied to a park fund as provided by the Act giving the power to sell, etc.

In an action by a ratepayer to prevent the land from being used as a cattle market and more money being spent on it for that purpose in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the act of the Provincial Legislature was *ultra vires* in dealing with it; it was

Held, on demurrer, that the words in the patent "Provided always and this grant is subject to the following conditions" did not create a *condition* annexed to the estate granted but a trust was created, as if the words used had been "upon the following trusts," and that by the grant the grantors parted with all their estate and interest; that the matter came within sub-section 13 of section 92, B. N. A. Act, "Property and civil rights in the Province," and the Provincial Legislature was the proper one to legislate on the subject, and the Act was not *ultra vires*.

Held, also, that the words "otherwise dispose of" when read with the rest of the Act, covered the mode of using the property adopted, viz: as a cattle market, and the demurrer was allowed with costs.

C. Robinson, Q.C., and McWilliams, for the demurrer.

McCarthy, Q.C., and Maclaren, contra.

Johnson, for the Attorney-General of Ontario.

[OSLER, J.A., 16TH JULY, 1886.]

REGINA v. SANDERSON.

Canada Temperance Act—Offence—Conviction—Habeas Corpus—Certiorari—Distress warrant—Commitment.

A prisoner having been convicted of an offence under the Canada Temperance Act, an application for her release was made under a *habeas corpus*, and a writ of *certiorari* was also issued.

Held, that the writ of *certiorari* must be superseded, and following *Regina v. Wallace*, 4 Ont. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the Magistrate.

Held, also, that no minute of the conviction need be served on the defendant, and that she must take notice of the conviction at her peril.

Held, also, that the truth of the return of the distress warrant cannot be tried upon affidavits.

Held, also, that the Bailiff's duty was to execute the warrant of commitment, and that he had no authority to receive the penalty and costs.

Held, also, that the warrant of commitment need not be dated at all if not issued too soon.

Held, also, that the conviction was regular on its face and could not be reversed or quashed on this application. While unreversed it warranted the commitment, and the prisoner was therefore remanded.

Kappele, for the application.

Irving, Q.C., contra.

NOVA SCOTIA.

In the Supreme Court.

[19TH DECEMBER, 1883.]

WOODSWORTH v. INNIS.

Appeal from Magistrate's Court to the County Court—Defects in the affidavit for appeal—Power of the County Court Judge to amend.

The affidavit for appeal from the Magistrate's Court was defective, not being headed in the cause, and the words "before me" being omitted from the jurat. The Judge of the County Court was satisfied that the defects occurred through inadvertence and without the fault of the appellant, and without any intention to evade the requirements of the statute, but dismissed the appeal on the ground that he had no power to amend the affidavit.

Held, that he had such power.

[20TH JANUARY, 1884.]

WEST v. BOUTILIER.

Accident caused by negligent driving—Contributory negligence—Driver liable notwithstanding such negligence if he could have avoided accident by exercising ordinary care—Verdict for defendant set aside.

In an action to recover damage sustained by plaintiff's son in consequence of the negligent driving of defendant's servant, the learned Judge submitted two questions to the jury :

1. Was the injury to the boy the result of the negligence of defendant or his servant, in driving the horses or team, and
2. Could the boy, by the exercise of ordinary care, have avoided the injury ?

The jury having found a verdict for defendant, under the direction of the learned Judge as the result of their findings on the questions put to them,

The verdict was set aside, and a new trial ordered on the ground that the question should have been put to the jury whether, assuming negligence on the part of the boy, the injury could not have been avoided by the exercise of ordinary care on the part of the driver.

[24TH JANUARY, 1885.]

TAYLOR v. GAVIN.

Motion to dismiss appeal for insufficient bond—New bond ordered to be filed—Costs.

The bond for appeal taken under section 100 of the County Courts Consolidation Act was given merely to pay the costs of the appeal and not to respond the judgment on appeal so as to cover costs below. On motion to dismiss the appeal, the Court ordered a new bond to be filed, the appellant to pay the costs of the motion.

[25TH MARCH, 1885.]

WATEROUS ENGINE CO. v. CHRISTIE.

Action on promissory note—Waiver of notice of dishonour—Admission of liability—Verdict sustained with costs though declaration alleged notice and evidence only showed waiver.

In an action against defendant as endorser of two promissory notes the defence relied on was want of notice of dishonour. The evidence of

notice was insufficient, but the defendant admitted that he offered to settle the notes in another way than by payment.

Held, that this offer was evidence of an admission of liability amounting to waiver of notice.

Though the declaration alleged notice and evidence only proved waiver of notice, the Court refused to disturb the verdict or to deprive plaintiffs of their right to costs.

SEETON v. THE MERCHANTS' BANK.

Money paid on joint account—Right to recover—Set-off.

Plaintiffs, an unincorporated Marine Insurance Association, paid a sum of money into defendant Bank to indemnify the latter for guaranteeing payment of costs of an appeal pending in the English Admiralty Court. The appeal having been decided in the plaintiffs' favour, the defendant bank repaid all but one-fortieth of the amount deposited with them, and claimed the right to set-off against the amount retained as being the share of one of the members of the association, a debt due the bank by such member.

The bank having previously acted throughout the transaction in such a way as to show that their intention was to deal with the members of the association collectively, and the money having been paid in to the credit of the association,

Held, that the plaintiffs were entitled to recover.

JACKSON v. MUNICIPALITY OF CUMBERLAND.

Application to amerce county for costs refused—Prosecution by clerk of licenses—Conviction quashed for want of jurisdiction.

Plaintiff, as clerk of license for one of the districts of the county of Cumberland, brought an action before two magistrates to recover a penalty for the illegal sale of intoxicating liquors. The magistrates rendered a decision in plaintiff's favour, which was quashed in the Supreme Court, where it was brought by *certiorari* for want of jurisdiction, on the ground that one of the magistrates was related to the plaintiff. The Municipal Council having refused to allow plaintiff his costs, application was made under chapter 75 Revised Statutes (4th series) section 55 to amerce the county.

Held, Smith and Johnson, JJ., dissenting, that there being no jurisdiction in the justices to issue process or try the cause plaintiff had acquired no right under the statute to be compensated for his outlay.

[21st APRIL, 1885.]

BARSS v. THE BANK OF NOVA SCOTIA.

Banking Act—Shareholder—Right to transfer shares—Insolvency—Perpetual injunction to restrain suit.

Plaintiff being the holder of a number of shares in the Bank of Liverpool sold the same to S. and forwarded to him a power of attorney authorizing the registry of the transfer. At the same time he forwarded to the manager of the bank his stock certificates to be cancelled on the transfer being registered, and notified the bank of the transfer. S. paid the consideration for the shares, and received the transfer, which he forwarded to the manager, whom he requested and authorized to register his acceptance. The bank declined to register the transfer until after payment of a certain loan obtained by the Bank of Liverpool from the Bank of Nova Scotia, which had been procured in pursuance of a resolution passed at a meeting of shareholders at which plaintiff was present, and which purported to bind the shareholders to hold their shares without assigning them until the principal and interest on such loan had been fully paid. In the meantime the bank retained the papers, promising that when the loan was repaid the transfer would be duly entered; subsequently the Bank of Liverpool became insolvent and assigned to the Bank of Nova Scotia.

Held, (on the authority of *Smith v. The Bank of Nova Scotia*, 3 S. C. R. 558, there being evidence that the loan was effected on other security than the resolution, and that the resolution was never acted upon) that plaintiff was not deprived by the passage of the resolution of his legal right to transfer his shares and to have the transfer registered in the books of the bank.

McPHERSON v. McDONALD.

Agreement to forward goods for sale to pay advances—Equitable title, transfer of—Replevin—Bill of lading—Judicature Act, enforcement of equitable rights under.

H. and M. entered into an agreement under which M. was to supply H. with tin plates, money, etc., to carry on the business of packing lobsters, and H. was to forward to M. all the goods which he should pack, in order that the supplies might be paid for out of the proceeds of the sales of the goods, M. being paid a commission for selling. This agreement was acted upon for six years, not only in relation to lobsters, but also in relation to beef, which was packed during the latter part of this period. At the end of 1882, H. was indebted to M. from \$7,000 to

\$9,000 on the account between them. In the month of December of that year H. shipped 180 cases of beef of the value of \$1,000, on board a schooner bound to Pictou, consigned to the freight agent of the Intercolonial Railway at that place, but addressed to M. He wrote M. informing him of the shipment, and forwarded to him a bill of lading of the goods, on the margin of which M.'s name was indorsed. M. transferred the bill of lading to plaintiff as security for accommodation indorsements and plaintiff brought replevin against the station master of the Intercolonial Railway at Halifax, who at the instance of H. refused to deliver the goods.

Held, Weatherbe, J., dissenting, (i) that, under the agreement and course of dealing between the parties, M. had an equitable title to the goods which was transferred by the indorsement to the plaintiff. (ii) That H. in pursuance of the agreement having taking steps to put the goods in the possession of M. the effect of the shipment and other acts, taken together, gave M. the legal as well as the equitable title, and placed the defendant in the position of wrong-doer.

Held, also, that after the passage of the Judicature Act the judge presiding at the trial was bound to give effect to the equitable rights of the parties, though the cause had been at issue previously.

MESSENGER v. PARKER.

Canada Temperance Act—Prosecutions under—Witness—Arrest for disobedience of summons to appear and testify—Escape and pursuit—Jurisdiction of magistrate to call witnesses—Power to adjourn hearing.

Plaintiff was summoned to appear as a witness for the prosecution on the trial of an information for a violation of the Canada Temperance Act of 1872. He was served with the summons, and was paid the regular fees for travel and attendance, but disobeyed the summons, and made no excuse. The magistrate before whom the information was laid issued four warrants in succession, to have plaintiff arrested and brought before him to testify, and adjourned the hearing of the cause from time to time for that purpose. Plaintiff evaded arrest under the first three warrants, but was arrested under the fourth. Having escaped he was re-arrested by defendants, who gained access to a house in which he had taken refuge, by raising a window. On his refusal to give bail he was placed in jail.

Held (i) That as the magistrate had jurisdiction to enter on the enquiry as to the fact of the proclamation of the Act, and whether licenses were outstanding or not, he had authority to compel the attendance of witnesses.

(ii) With regard to defendants opening the window and entering the house to make the arrest,

(a) That the prosecution being a criminal proceeding the warrant was not subject to the limitations which attach to civil process, but had many of the characteristics of an attachment for which it was substituted.

(b) That the evidence showing a previous arrest and an escape, the defendant might lawfully enter the house in fresh pursuit.

(iii) That the placing of the plaintiff in jail under the circumstances was justifiable.

(iv) That section 46 of the Summary Convictions Act is not intended to prevent more than one adjournment or, if so, the plaintiff could not take the objection.

RHODES v. PATRICK.

Jury in County Court—General verdict instead of findings on specific facts sustained—Irregularity—Acquiescence of parties.

On the trial of an action on the common counts before a Judge of the County Court a jury was called by consent for the purpose of having certain facts in controversy submitted to them. The learned Judge instructed the jury that the case was one of conflicting evidence, and that on every material fact the plaintiff and defendant differed. After referring particularly to the facts in dispute he left the case, without any objection made, entirely with the jury, who found a general verdict in favour of defendant.

Held, Rigby and McDonald, JJ., dissenting, that while the verdict should have been a finding on disputed facts, and not a general verdict for the plaintiff or defendant, such general verdict was only an irregularity, and should not be treated as a proceeding *coram non iudice*. The objection might be fatal in some cases, but, in the present case, was merely formal, as, on the facts found for defendant, he was clearly entitled to judgment, and all parties acquiesced in the manner in which the case was put to the jury.

KEITH v. INTERCOLONIAL COAL MINING COMPANY.

Railway company—Crossing—Negligence of Company's employees—Injury caused by a locomotive.

While plaintiff was passing over the track of the railway operated in connection with defendant's mines he was knocked down by a locomotive and crippled for life. At the point where plaintiff was injured there were four tracks, including sidings, between the workmen's houses and the Works, which the men were obliged to cross twice a day, and over which children frequently crossed to carry food to men working in the pit. The crossing had been so used for sixteen years, and at the time of the accident, was used as a road for horses and carts. The common practice was to blow a whistle when engines were moving about, but, on this occasion, no whistle was blown, and the view of the track was obstructed by some box cars which had been left standing upon a siding close to it. The instant plaintiff passed the box cars he was warned of his danger, but he was struck by the engine before he had time to escape.

Held, that the damage was the direct result of the negligence of the servants of the defendant company, for which the company were liable, and that there was no evidence of negligence on the part of the plaintiff.

Davey v. London and S. W. Railway Company, 11 Q. B. D. 213, distinguished. Verdict for plaintiff sustained.

MOFFATT v. FERGUSON.

Assignment for benefit of his creditors—Interest in shipping not transferred by—Rights of judgment creditors as against assignee—Merchants Shipping Act—Execution—Replevin.

W. H. M. made an assignment to plaintiff for the benefit of his creditors of his entire property, including a number of shares in the schooner *G. W. Moore*, but no bill of sale of the shares, as required by the Merchants Shipping Act, was either executed or delivered to plaintiff. D. and M. having obtained a judgment against W. H. M., issued a writ of execution, under which defendant, as sheriff, levied upon the share and proceeded to sell. Prior to the sale plaintiff appeared before the Registrar of Shipping, and, after making a declaration of ownership, was entered upon the register as owner of the shares.

Held, that plaintiff had no equitable right which could be so asserted, or which could prevail over the judgment creditor and the levy made by the defendant.

In re WILSON.

Mandamus—King's College—Dismissal of a Professor—Powers of the Board of Governors—Powers of Visitors—Affidavit headed "in the matter of an application intended to be made," held good.

An application was made for a mandamus to compel the governors of King's College, Windsor, to restore W. E. W., a professor of the college, to certain offices from which he had been dismissed for having published in a public newspaper a letter "incompatible with the relation of a professor to the governing body and the superior officers of the university" and manifesting "a contempt of authority likely to lead to subversion of discipline," etc. The college was incorporated under an Act of the Legislature of Nova Scotia in 1789, and a charter was obtained from the Crown. Thirteen years later letters patent were issued by the Crown appointing the Bishop of Nova Scotia visitor of the college. In 1853, a provincial Act was passed repealing the former Act and re-appointing and re-incorporating the Board of Governors, giving them power to make laws and ordinances for the regulation and management of the college, and providing that the Bishop of Nova Scotia for the time being should be *ex officio* a Governor of the College, President of the Board, and Visitor. By the original Act an annual charge was made upon the revenue of the province for the purpose of purchasing lands and erecting buildings and certain public officials were made *ex officio* members of the Board of Governors.

No notice was given to the professor of the proceedings which terminated in the sentence of removal.

The affidavit upon which the application for the mandamus was made was headed "In the matter of an application intended to be made to the Supreme Court for a mandamus," etc.;

Held, per Thompson and Rigby, JJ., and Macdonald, C.J., that the mandamus should issue; that the professor was entitled to notice; that the college being a public corporation established by public statute, and the Visitor being deprived of the power to dismiss, the wide range of powers incident to the office of Visitor at common law, were not conferred upon him, and the Court, therefore, had power to hear the motion; that the office of professor was one in relation to which mandamus would lie. Also, that the heading of the affidavit upon which the application was made was mere matter of description, and was distinguishable from the heading of the affidavit in *Re Peter Ross*, 2 R. & C. 596.

Weatherbe and McDonald, JJ., dissented on the ground that the sole appeal from the decision of the Board was to the Visitor, and the latter, on the further ground that the heading of the affidavit was bad.

RAMIE v. WALKER.

Negligent driving—Collision—Contributory negligence—Verdict for defendant sustained.

Plaintiff and defendant were driving in opposite directions along the public highway after dark, when a collision occurred by which plaintiff's carriage was overturned and plaintiff seriously injured. At the time of the collision defendant's team was being driven slowly along the middle of the highway, but it appeared that there was sufficient room at either side for plaintiff to pass, and also, that plaintiff saw defendant's team approaching in sufficient time to have drawn up and thus avoided the collision.

Held, that in an action brought by plaintiff for negligence, the jury were justified in finding a verdict for defendant. Where the highway is used in the customary way, or in such a way as circumstances may make necessary, evidence of actual negligence must be given.

WHITMAN v. PARKER.

Bill of exchange—Failure of consideration—Contract for sale of shares in a ship—Partial destruction of subject matter of the contract before acceptance—Introduction of a new element.

Defendant was the drawer of a bill of exchange given in payment for certain shares in a vessel called the *Lawrence Delap*, then discharging a cargo at New York. Payment of the bill was resisted on the ground that at the time of the completion of the contract and the transfer of the shares the vessel had been totally destroyed by fire and had ceased to exist, and that there was therefore no consideration for the bill at the time it was delivered. The evidence showed that on the morning of the day on which the bill was delivered and the transfer made, the vessel took fire, and that before the transfer was made her mast had fallen, the inside had been gutted, the decks burned and part of the sides. In this condition the vessel was towed out into the harbour and scuttled. The hull was subsequently raised and sold; the price realized being \$500 less than the cost of raising it. The hulk was subsequently converted into a coal barge.

Held, Rigby, J., dissenting, that there was not such a total failure of consideration as to form a defence to an action on the bill.

The negotiations for the sale were conducted by correspondence. On July 9th, 1883, plaintiff wrote that he was prepared to make the transfer on payment of a specified price. On the 11th, defendant telegraphed

plaintiff, "will see you first next week, pay for ten shares *Delap* and take title." The fire and the delivery of the bill sued on took place on the 19th.

Per Weatherbe, J. The contract was completed by the telegram of the 11th, and the property would pass notwithstanding the postponement of the time of payment by the defendant.

Per Rigby, J. The postponement of the time of payment introduced a new element which would require acceptance to constitute a complete contract.

LETTENEY v. DILLON.

Appointment of Commissioners of streets—Rotation system continued.

Held, McDonald, C.J., dissenting, that section 16, of chapter 49, R. S. 4th series, providing for the retirement of Street Commissioners by rotation, applies to the appointment of Commissioners by the Municipal Council *mutatus mutandis*.

McINTOSH v. McLEOD.

Promissory note—Indorsement after maturity—Holder for value without notice—Sale of growing trees—Misrepresentation—Statute of Frauds—Stamp Act—Note insufficiently stamped—Double stamped after repeal of Act—Estoppel.

Defendants purchased a quantity of growing trees and gave in payment herefor their promissory note, which after passing through the hands of two other holders, and after it became due, was indorsed to the plaintiff or value and without notice.

To an action by plaintiff to recover the amount of the note, defendants pleaded among other things—

1. That they were induced to make the note by fraud.
2. That there never was any consideration for the note, inasmuch as the trees in payment for which it was given, were not of the character and number represented, and were worthless and unmerchantable.
3. That the note was not properly stamped. A defence was also raised under the Statute of Frauds on the grounds—
 1. That the trees were goods and merchandise, and there was no receipt or acceptance of the goods and no part payment.
 2. That the contract having been made in reference to growing trees, required a note or memorandum in writing.

It appeared from the evidence that there was no warranty as to the condition of the trees, that the defendants had an opportunity of examining them before making the contract and that they asked to be relieved after the contract was completed, on another ground than the misrepresentation alleged.

Held (i), that the plea of fraud and misrepresentation was not made out. (ii) That the contract for the sale of the trees had no connection with any interest in land. (iii) That the defendants could not set up want of consideration for the note as a defence to an action by an innocent holder.

At the time the note came into the hands of the plaintiff it was insufficiently stamped, and plaintiff, immediately on becoming aware of the defect affixed double stamps. The Dominion Stamp Acts including the Act in reference to double stamping, were then repealed. It was contended that the note was void for want of proper stamps, and that by the repeal of the Act the right to double stamp had been taken away.

Held, that the note was properly double stamped by plaintiff, and that the objection to his right to double stamp could not prevail, the right to double stamp continuing notwithstanding the Act. Macdonald, C. J., dissented^a on the ground that the contract was one on which the original payees could not recover under the Statute of Frauds, and the plaintiff stood in the same position, the note having been indorsed to him after maturity.

CREELMAN v. McMULLEN.

Award—Finding beyond jurisdiction—Publication—Absence of one arbitrator.

Plaintiff claimed that the defendant was indebted to him for work and labour in sawing logs of the defendant, and defendant claimed a set-off. The matter was referred to arbitrators who made an award in favour of defendant, and added a finding that the logs remaining unsawed were defendant's property.

Held, that this finding was outside of the jurisdiction of the arbitrators, but being clearly separable from their finding on the matters within their jurisdiction, was a mere nullity not affecting the validity of the award.

The submission empowered the arbitrators, or any two of them to make an award. The three arbitrators sat, and read all the evidence, and adjourned to meet at Halifax; but the award was executed by two of the arbitrators in the absence of the third, who did not attend the meeting, of which he had notice, and at which the award was signed. The award was filed on the same day with the prothonotary of the county in which the cause was pending, enclosed in an envelope, and on

the same day was opened by defendant in the office in presence and by the authority of one of the arbitrators.

Held, that the award was duly made and published.

McDonald, C.J., *dubitante*, as to the power of the two arbitrators to make the award in the absence of the third.

WHITMAN v. THE W. & A. RAILWAY CO.

Railway Company—Liability for defective condition of cattle guard at intersection of railway with highway—Cattle unlawfully on highway—Onus of showing negligence in such case on owner of cattle—Railway Act of 1880.

Plaintiff's cattle were turned out upon the public highway for the purpose of being driven to pasture, and while there, unattended, got upon defendant's line of railway, in consequence of the defective condition of the cattle guard at the intersection of the railway with the highway, and one of the cattle was killed by a passing train.

Held (i) that the clause of the Act (Railway Act of 1880) requiring guards at crossings could not be construed to render the company liable to owners of cattle unlawfully on the highway.

(ii) That the damage not having been done at the point of intersection, plaintiff was not absolutely precluded from recovering, but was subjected to the onus of showing that defendant might, by the exercise of ordinary care and diligence, have avoided the mischief, and having failed to do so, the verdict in his favour could not stand.

MOSS v. THE EUREKA WOOLEN MILL CO.

Verdict set aside—Preponderance of evidence—Plea of set-off.

In an action on a bill of exchange drawn by plaintiffs, and accepted by defendants, the latter relied upon a plea of set-off for goods sold and delivered.

The preponderance of evidence showed that the goods in question were forwarded to the plaintiffs to be sold by them on commission. The jury having found a verdict for defendants the verdict was set aside.

FRASER v. McLEOD.

Account stated—Memorandum—Consideration—Promise to pay the debt of another.

Plaintiff had a claim against defendant, and also a claim against defendant's brother. Defendant having agreed to pay both debts signed a memorandum as follows:—"1881, Oct. 21. To bal. per settlement at this date, \$80.00. I acknowledge the above amount to be correct and promise to pay it forthwith."

Held, not an account.

Held, also, that, to enable plaintiff to recover as on an original contract, a consideration for assuming the brother's debt should have been shown.

 MERCHANTS' BANK v. DE WOLF.

Order setting aside pleas discharged—Discovery of new defence after pleas pleaded—Costs.

Defendant pleaded to an action brought against him as maker of a promissory note, and an application was made to set aside his pleas. Defendant subsequently became aware of the existence of evidence which would show payment of the note sued on by the payee, and applied on affidavit to the learned Judge before whom the motion to set aside his pleas was heard for leave to examine a witness on this point. The application was refused and the pleas were set aside.

On appeal an order was granted for the examination of the witness; and the evidence when taken going to prove payment of the note sued on, as stated, the order setting aside the pleas was discharged, and the cause sent to trial. Costs to abide the event.

 WOODLOCK v. DICKIE.

Action on bond for security for costs—Should be summary where amount in dispute is under \$80—Demurrer will not lie to "grounds of defence"—Costs refused to a party who has contributed to an error.

A bond was given as security for costs on an appeal to the County Court from the Magistrate's Court. An action was brought on the bond, and pleas were pleaded as to a declaration cause. Plaintiff demurred to the pleas and defendant joined in the demurrer. The demurrer book showing on its face that the amount actually in dispute was under \$80,

the County Court Judge treated the suit as a summary suit, and the pleas as grounds of defence, and set aside the demurrer on the ground that demurrer will not lie in summary suits.

Held, that he was right in doing so.

Held, also, that defendants were properly refused costs on the judgment in their favour on the demurrer, as they had contributed to the error by pleading and in other ways.

[21st JULY, 1885.]

CROWE v. McCURDY.

Contested Municipal Election—County Court Judge authorized to hear petition—One Judge, if disqualified, may call in another—Power of Local Legislature to define jurisdiction of County Court Judges.

Under the County Corporation Act of 1881, cap. 1, sec. 18, a County Court Judge who is disqualified from trying a petition in a contested municipal election may call in another County Court Judge to do so.

The jurisdiction of County Court Judges does not depend upon their commissions, which are only descriptive of the tribunal over which such Judges are appointed to preside, but upon enactments of the Provincial Legislature, which may define, enlarge and extend the districts within which the Judges sit as it sees fit.

[4TH AUGUST, 1885.]

McLEAN v. McISAAC.

Action against Indian Commissioner for arrest of a person trespassing on Indian Reserve—Verdict for plaintiff set aside.

Plaintiff having continued to trespass upon a portion of the Indian Reserve Lands at Whycocomagh, Inverness, by cutting hay, etc., after notice to cease doing so, one of the defendants, as Indian agent and Justice of the Peace, issued a warrant, under which plaintiff was arrested by the Sheriff, assisted by another defendant, who was called upon by the Sheriff for that purpose; and, after trial and conviction, was committed to jail in default of the fine imposed under chapter 28 of the Dominion Acts of 1880, sec. 27. Plaintiff thereupon brought an action claiming damages for the arrest, and the jury having found a verdict in his favour against the Judge's charge, the verdict was set aside with costs.

LOGAN v. THE COMMERCIAL UNION ASSURANCE CO.

Action on fire insurance policy—Conditions—Certificate of Magistrates—Waiver—Verdict for plaintiff set aside—Costs.

A policy of insurance contained a condition requiring the insured, in case of loss, to procure a certificate as to the matters contained in the statement of loss, under the hands of two magistrates most contiguous to the place of fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was clearly expressed in writing, endorsed on the policy. The evidence was conclusive that the two magistrates most contiguous to the place of fire were applied to for their certificate, but refused to give it, and there was not sufficient evidence of waiver. The jury having found that both conditions had been waived, and a verdict having been entered on their finding for plaintiff, the verdict was set aside with costs.

Caldwell v. The Stadacona Fire Insurance Company, distinguished.

REGINA v. CHESLEY.

Action on bond for faithful discharge of duty by public official—Fraud—Negligence—Liability of surety—Proximate cause—Estoppel.

In an action against defendant as one of the sureties on a bond purporting to have been given for the faithful discharge of the duties of the agent of the Government Savings Bank at Annapolis, it appeared that the bond and the affidavit of justification required to accompany it were signed by the defendant in blank; that the bond at the time was without seals, date or amount, and that the affidavit was never sworn. The bond was subsequently filled in for double the amount authorized by defendant, and the affidavit, after having been filled in, was certified as sworn by a Justice of the Peace.

Held, McDonald, J., dissenting, that the bond having been accepted on the faith of the certificate of the Justice, and the certificate not having been procured or made by defendant, the latter could not be made liable for the default of the officer.

TROOP v. THE MERCHANTS MARINE INSURANCE CO.

Constructive loss of freight—Right to recover.

Defendants resisted a claim for loss of freight, on the ground that freight had actually been earned. The facts were that the underwriters, to whom the vessel had been abandoned, accepted the abandonment

under protest, repaired the vessel and earned the freight. It was not contended that they did so as agents for the plaintiffs.

Held, McDonald, C.J., dissenting, that the plaintiffs could not recover as for a total loss of freight, freight having actually been earned.

TAYLOR v. GAVIN.

Canada Temperance Act, 1878—Prosecution for violation of provisions.

Defendant was prosecuted for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, 1878, and was discharged for want of evidence that the liquor was sold by him personally or with his authority. On appeal the judgment below was sustained, though the Court were strongly of opinion that on the evidence defendant should have been convicted.

NEW BRUNSWICK.

In the Supreme Court.

STEPHENSON v. FRASER.

Goods sold and delivered—To whom credit given—Evidence—Statement of facts by witness—Juror—Disqualification—Challenge—Notice of motion for new trial—Statement of grounds.

In an action for goods sold and delivered, in which the question was whether the credit was given to the defendant, or to D. F., to whom the goods were actually delivered, and who carried on a retail trade near the defendant's shipyard, and supplied the men in defendant's employ, in part payment of their wages—the evidence for the plaintiff being, that by agreement the credit was given to the defendant, and that the goods were to be paid for by D. F.'s notes at three months, to be taken up at maturity by the defendant's notes at four months.

Held, that D. F.'s statement to the plaintiff, when he gave him a note of the defendant's to take up D. F.'s note given for the price of goods, was admissible, without producing the defendant's note.

Held, also, per Wetmore and Fraser, JJ., Palmer, J., dissenting, that the plaintiff could be asked, for the purpose of showing part-performance of the alleged agreement by the defendant, how long the defendant continued to carry out his part of the arrangement.

Per Palmer, J. The question assumed that something had been done by the defendant under the agreement; and the answer to it stated no facts from which the Court could determine whether there had been a part-performance of the agreement or not.

It is not a ground for new trial that one of the jurors was disqualified, being an alien. The objection should be taken by challenge.

Quære. Whether, under a notice of motion for a new trial on the ground that the verdict is "against evidence" it is open to the party to argue that it is against "the weight of evidence."

GREENE v. HARRIS.

Contract under seal—Breach—New agreement by parol—Accord and Satisfaction—Order for goods to be manufactured—Part payment in advance—Refusal to deliver without payment of unauthorized extras—Recovery of advances—Action for money had and received—Tender of contract price.

Plaintiff ordered from defendant, a manufacturer, goods which were to be according to specification, and made a part payment in advance; the defendant refused to deliver the goods unless unauthorized extra work was paid for.

Held, that the plaintiff could recover the amount advanced in an action for money had and received, without tendering the contract price of the goods.

Defendant made a contract under seal to build fifty railway cars for plaintiff according to specification. After twenty-four of the cars had been delivered, and after the plaintiff was aware that they were not according to the contract, he agreed, verbally, to abandon all claim for damages for breach of the contract, if defendant would make certain alterations in the remainder of the cars—which the defendant did.

¶ *Held*, that this amounted to accord and satisfaction of the plaintiff's claim for damages in respect of the twenty-four cars.

THE CANADIAN LAW TIMES.

VOL. VI.

OCTOBER, 1886.

No. 12.

VICE-ADMIRALTY JURISDICTION—DAMAGE.

THE High Court of Admiralty had originally cognizance of all Maritime torts and offences committed upon the high seas, in ports and havens as far as the ebb and flow of the tide, in great rivers beneath the bridges thereof near the sea, (*infra primos pontes*), and in all foreign ports (*a*). This jurisdiction formerly comprehended the trial and punishment of crimes; but the criminal jurisdiction was at an early date abolished (*b*). Compensation for injuries to persons or to property was sought in what was styled a “cause of damage civil and maritime.” Such suits were not unfrequently brought by passengers or mariners on board ships, for damages for ill-treatment, cruelty or assault committed by the master on the high seas (*c*); and the Vice-Admiralty Courts have exercised a similar jurisdiction (*d*).

But this branch of Admiralty jurisdiction was chiefly occupied with claims for injuries arising from collision between two ships, owing to the negligent or unskilful management of one or both. For damage so caused the

(*a*) *The Hercules*, 2 Dod. 371; Pritchard's Ad. Dig. Preface IV.

(*b*) In Marsden's Ad. Cas. will be found charges to the Grand Jury at the Admiralty sessions in 1680 and 1774.

(*c*) *The Agincourt*, 1 Hagg. 272; *The Luna*, 3 Hagg. 353; *The Louthier Castle*, 1 Hagg. 385; *The Enchantress*, 1 Hagg. 395; *The Centurion*, 1 Hagg. 161; *The Ruchers*, 4 Rob. 73.

(*d*) *The Sarah*, 1 Stuart 84; *The Coldstream*, 1 Stu. 386; *The Friends*, 1 Stu. 118; and *The Toronto*, 1 Stu. 170.

delinquent ships are responsible, even though in some cases there may be no liability on the part of the actual owners. But for wilful, malicious, unlawful and unauthorized acts of the master of the damaging vessels, neither the vessel nor her owners are responsible. In *The Druid* (e), where the damage sued for was caused by such an act of the master of a tug in propelling her against a vessel and otherwise ill-using the latter, with a view to compelling her to employ the tug, Dr. Lushington in deciding against the claim observed, "The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and *vice versa*, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." But the expression "owners" used in that judgment must be taken to include charterers or other persons in lawful possession of the ship, under contract with the owners (f). The principles which govern the liability of the ships or owners for the acts of their own servants or agents, are the same in Admiralty as at Common Law (g). So in *The Orient* (h), a ship in possession of an agent for the purpose of being completed and afterwards sold by him, was so negligently moored as to damage another ship. An action was brought by the owners of the damaged vessel *in rem* against the other ship, but on these facts being proved, the Court (Sir Robert Phillimore) held that the plaintiffs had no cause of action, inasmuch as the ship was not in the possession or custody of the servants of her owners (i).

In the 13th and 15th years of Richard II., Acts were passed which restricted the jurisdiction of the High Court of Admiralty to "things done on the high sea only (j)."

(e) 1 W. Rob. 391.

(f) *The Ticonderoga*, Sua. 217; *The Annapolis*, Lush. 295; *The Tennington*, 2 Asp. Mar. Law Cas. 475; *The Protector*, 1 W. Rob. 45; *The Maria*, *Ibid.* 95; *The Ida*, Lush. 6.

(g) See Marsden on Collision, pp. 31-33, notes; *The Halley*, L. R. 2 P. C. 193; *The M. Mozham*, L. R. 1 P. D. 107.

(h) L. R. 3 P. C. 696.

(i) In a similar case, however, *The Ruby Queen*, Lush. 266, the decision was just the other way.

(j) *Williams & Bruce*, pp. 5-7.

This restriction was, however, removed by “An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty” (*k*), passed in 1840, the 6th section of which enacted that the Court should have jurisdiction to decide all claims and demands whatsoever in the nature of *damage received by any ship*, or sea going vessel, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the damage was received. This jurisdiction was further extended by “The Admiralty Court Act, 1861” (*l*), by section 7 of which it is declared that the Court shall have jurisdiction over *any claim for damage done by any ship*. The jurisdiction of Vice-Admiralty Courts was not affected by legislation until the year 1863. At this time they possessed and were entitled to exercise only the ordinary admiralty jurisdiction of the High Court prior to its extension by the statutes referred to (*m*). By “The Vice-Admiralty Courts Act, 1863” (*n*), section 10, sub-section 6, it is declared that these Courts shall have jurisdiction over “*claims for damage done by any ship*.” In the case of *Monaghan v. Horn* (*o*), it was held by the Supreme Court of Canada that the latter expression comprehends all that is included in the phrase “any claim for damage done by any ship,” which is used in the Admiralty Court Act, 1861 (*p*), above referred to.

The jurisdiction of Vice-Admiralty Courts, except where it is expressly confined by the Act of 1863 (*q*) to matters arising within the possession in which the Court is established, may be exercised whether the cause or right of action has arisen within or beyond the limits of such possession (*r*); and the Act expressly declares that nothing in it shall be construed to take away or restrict “any other jurisdiction now lawfully exercised by any such Court” (*s*).

These statutes, it will presently be seen, materially ex-

(*k*) 3 and 4 Vict. cap. 65.

(*m*) *The Australia*, Sua. 480.

(*o*) 7 S. C. R. 409.

(*q*) 26 and 27 Vict. cap. 24.

(*s*) Sec. 12.

(*l*) 24 Vict. cap. 10.

(*n*) 26 and 27 Vict. cap. 24.

(*p*) 24 Vict. cap. 10, sec. 7.

(*r*) 26 and 27 Vict. cap. 24 sec. 13.

tended the jurisdiction both of the High Court of Admiralty and Vice-Admiralty Courts in cases of *damage*.

The first enquiry is as to the meaning of the term "ship" in those Acts. In order to confer jurisdiction on the High Court of Admiralty, the "damage" must be *done* or *received* by a "ship." The Vice-Admiralty Courts Act does not declare that those Courts shall have jurisdiction over claims for damage *received* by a ship, and it is at present by no means clear whether or not a greater jurisdiction is created by the expression damage *received* by a ship.

By "The Admiralty Courts Act, 1861" (t), "ship shall include any description of vessel used in navigation not propelled by oars." The same definition is contained in "The Merchant Shipping Act, 1854" (u). In the Vice-Admiralty Courts Act, 1863, the definition is "every description of vessel used in navigation not propelled by oars only, whether British or foreign" (v). There have been decisions and some fluctuation of opinion as to the meaning of these definitions. The result of the authorities appears to be that the term "ship," in reference to Admiralty and Vice-Admiralty jurisdiction, is not limited but extended by these enactments, and comprehends all kinds of vessels used for conveying persons or property or both by water, whatever means of propulsion are used, and whether the power is external to the vessel or not, excluding, however, those which are propelled by oars only.

In *Ex parte Ferguson*, it was held that a fishing coble which had two masts and a rudder removable, and also four oars by which alone she could be, and at times was propelled, was "a ship," and that the words "not propelled by oars," mean vessels not propelled by oars exclusively, or as the Vice-Admiralty Courts Act expresses it "not propelled by oars only." So a barge propelled by oars only has been held excluded by the definition (w). A hopper-barge, which had a bow, stern and rudder, and was "steer-

(t) 24 Vict. cap. 10.

(u) 17 and 18 Vict. cap. 14, sec. 2.

(v) 24 Vict. cap. 10, sec. 2.

(w) *Everard v. Kendall*, L. R. 5 C. P. 428.

able," but without any means of propulsion in herself, ordinarily towed, and used for dredging purposes, was held by Sir Robert Phillimore to be excluded on the ground that she was not "used in navigation" (*x*). On appeal, however, his decision was reversed (*y*), the Court disapproving of the new expression by Blackburn, J., in *Ex parte Ferguson* (*z*), that a "ship" means a vessel "whose business it is really and substantially to go to sea," and holding that that term does not necessarily mean a sea-going vessel, that the statutory definition is intended to extend its meaning, and does not deprive it of any of its ordinary meaning (*a*). So the Maritime Court of Ontario entertained a cause of wages against a barge similar to the *Mac* used for carrying freight on the Welland Canal (*b*). In *The Nithsdale* (*c*), the same point was discussed in that Court, and a dredge was held to be excluded.

It will be convenient to divide this subject of Vice-Admiralty jurisdiction into two branches:—I. *Damage to Persons*; and II. *Damage to Property*.

I. Damage to persons and first as to *Compensation to families of persons killed in collision*.

Prior to and apart from Lord Campbell's Act (*d*), it is clear that no action would lie for such compensation at Common Law. In the case of *Monaghan v. Horn* (*e*), the Supreme Court of Canada expressly decided this point, following *The Guldfaxe* (*f*) and *Osborne v. Gillet* (*g*). In the cases presently referred to, it appears to have been taken for granted that no such action would lie independently of the statute. As statutes

(*x*) *The Mac*, L. R. 7 P. D. 38.

(*y*) L. R. 7 P. D. 126.

(*z*) L. R. 6 Q. B. at p. 291.

(*a*) See also *The C. S. Butler*, L. R. 4 A. & E. 238.

(*b*) *The Oscar Wilde*, 5 C. L. T. p. 335.

(*c*) 15 C. L. J., N. S. 268.

(*d*) 9 & 10 Vict. cap. 93.

(*e*) 7 S. C. R. 409.

(*f*) L. R. 2 A. & E. 325.

(*g*) L. R. 8 Ex. 88. Two of the members of the Court, Fournier and Taschereau, JJ., however, dissented, holding that the plaintiff who was the mother of the deceased, was entitled in the capacity of parent or mistress, independently of the statute, to recover damages for the loss of her son or servant.

similar to Lord Campbell's Act are in force in several British possessions within the jurisdiction of Vice-Admiralty Courts, and as the cases throw light upon the question of jurisdiction in cases of personal damage not resulting in death, it will be well to review the decisions on this point. After much conflict of judicial opinion it has finally been determined that the High Court of Admiralty (and therefore necessarily the Vice-Admiralty Courts in Possessions where similar statutes are in force), has no jurisdiction to entertain a claim under Lord Campbell's Act preferred by the personal representative of the deceased for compensation to his family for damage resulting from his death. The first case in which the Court was called upon to exercise this jurisdiction in recent times was *The Guldfaxe* (h), (1868), in which Sir Robert Phillimore held that the Court could entertain such a claim, but only by virtue of the statute, remarking, "Though it has been suggested, and is possible, that this Court may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the Court, or from other sources, to warrant me in pronouncing in favour of the jurisdiction of the Court upon this ground. If the Court be competent to entertain this suit, it must have derived such competence from statute law." He based his decision upon a consideration of the terms of the statute referred to and of the seventh section of the Admiralty Court Act, 1861 (i), and the provisions of the Merchant Shipping Act respecting limitation of liability (j). In *Smith v. Brown* (k), decided in the year 1871, it was sought to prohibit the widows parents and children (presumably suing in the name of the personal representatives) of the master and certain of the crew drowned in a collision, from proceeding with a suit instituted by them in the High Court of Admiralty to recover damages for the injury resulting to them from the deaths of those drowned. It was held (Blackburn, J., doubting), that the word "damage" in the Admiralty Jurisdiction Acts means mischief done to

(h) L. R. 2 A. & E. 325.

(i) 24 Vict. cap. 10.

(j) 17 & 18 Vict. cap. 104, sec. 514.

(k) L. R. 6 Q. B. 729.

property, and does not extend to loss of life or personal injury. This decision was generally approved of by the Court Common Pleas in *Simpson v. Blues* (l), and by the Court of Exchequer in *London v. S. W. R. Co.* (m).

But in 1877 Sir Robert Phillimore not deeming himself bound by this decision, sustained the jurisdiction of the Court in a similar case (n), as he had previously done in the cases of *The Guldfaxe* (o) and *The Explorer* (p), adhering to the decision of the Privy Council in *The Beta* (q), which will presently be referred to (r). On appeal the Court was equally divided, James and Baggallay, L. JJ. being in favour of the jurisdiction, and Bramwell and Brett, L. JJ., dissenting. The latter Judges, besides availing themselves of the judgment and reasons therefor in *Smith v. Brown* (s), especially the difference between the Admiralty and Common Law Rules as to contributory negligence, based their opinion against the jurisdiction claimed, upon the terms of Lord Campbell's Act, which directs the damages to be assessed by a jury, shewing that an action in the Common Law Courts only was contemplated by the Act. They expressly declined to offer an opinion as to whether the Court would have jurisdiction in a case of personal injury, where death did not result, and the person injured was the plaintiff. James and Baggallay, L. JJ., were of opinion that the words of the seventh section of the Act (t), taken by themselves, were sufficient to confer jurisdiction to entertain all claims in respect of damage done by a ship, whatever may be the nature of the damage, whether to person or to property. The Supreme Court of Canada considered this question and the authorities referred to in the case of

(l) L. R. 7 C. P. 290.

(m) L. R. 7 Ex. 187.

(n) *The Franconia*, L. R. 2 P. D. 163.

(o) L. R. 2 A. & E. 325.

(p) L. R. 3 A. & E. 289.

(q) L. R. 2 P. C. 447.

(r) *The Beta* was not a case under Lord Campbell's Act, but an action for personal injury not resulting in death. It is, however, often erroneously referred to as if it were a case under that Act

(s) L. R. 6 Q. B. 729.

(t) 24 Vict. cap. 10, sec. 7.

Monaghan v. Horn (u), but the plaintiff although the widow, not being the personal representative of the deceased, had no right to bring the action under the Canadian Act (r), which corresponds to Lord Campbell's Act, and on this ground the appeal was dismissed. Opinions in favour of the jurisdiction without the assistance of Lord Campbell's Act, were expressed by Fournier and Taschereau, JJ., and to the contrary by the Chief Justice and Gwynne, J.

The question has, however, been set at rest by a decision of the House of Lords in 1884. In *The Vera Cruz* (w), an action had been brought by the personal representative of the master of the *Agnes*, a vessel which was run into and sunk by the *Vera Cruz*. Both vessels were found to blame, and the plaintiff was declared entitled to recover one-half of the damages sustained from the *Vera Cruz*, in accordance with the Admiralty rule as to division of damage in cases of contributory negligence. The Court of Appeal (Brett, M. R., and Bowen and Fry, L. JJ.), unanimously reversed this decision, on the ground that there is no Admiralty jurisdiction to entertain a cause *in rem* against a foreign ship under Lord Campbell's Act. Brett, M. R., was of opinion that section 7 of the Admiralty Court Act, 1861, was intended to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship (x), or in other words over a case in which a ship was the active cause, the damage being physically caused by the ship. "I do not say," he continues, "that damage need be confined to damage to property, *it may be damage to person*, as if a man were injured by the bowsprit of a ship." Under Lord Campbell's Act, the real cause of action is pecuniary loss to the members of the family of the deceased, whose death is only part of the cause of action—it is not a cause of action for anything done by a ship, which is only one ingredient in the cause of action.

(u) 7 S. C. R. 409.

(v) R. S. O. cap. 128.

(w) L. R. 9 P. D. 88.

(x) The previous Act of 1840, 3 & 4 Vict. cap. 65-6, applied only to damage done to a ship; see *The Bilbao*, Lush. 145; *The Malvina*, Lush. 493.

Bowen, L. J., agreed with the judgments of Lord Bramwell and the Master of the Rolls in *The Franconia* (y). He was further of opinion that damage “done by a ship” means done by those in charge of a ship, with the ship as the noxious instrument. Injurious affecting the interests of the dead man’s family is not done by the ship in that sense. It arises partly from the death which the ship causes; and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. Fry, L. J., was of opinion that “damage” does include injury to the person, but that under Lord Campbell’s Act the action cannot be correctly said to be *for* damage done, though it is for damage resulting from or arising out of damage done. “I am confirmed in this view by observing the convenience of such a construction, which avoids the difficulty arising from the question of a trial by jury, and of the conflict between the Common Law and Admiralty Rules as to negligence.”

The case was carried to the House of Lords (z). Judgments were delivered by the Lord Chancellor (Earl of Selborne) and by Lords Blackburn and Watson, unanimously holding that the Admiralty Division cannot entertain an action *in rem* for damages for loss of life under Lord Campbell’s Act. Lord Selborne says:—“Inasmuch as there can be no right of action whatever unless it comes within the terms of Lord Campbell’s Act, let us see whether those are terms which can be brought reasonably and naturally and consistently within the interpretation sought to be imposed on the 7th section of the Act of 1861, which statute (a) turns the action into an action *in rem* at the option of the plaintiff. Now what are the words? ‘Whosoever the death of a person shall be caused by wrongful act, neglect or default’—all words plainly applicable only to a person doing an act or guilty of a neglect or default, and not to an inanimate instrument or thing—‘and the act neglect or default is such as would (if death had not ensued) have entitled the party to maintain an action and recover damages in respect thereof’—‘to maintain an

(y) L. R. 2 P. D. 163.

(z) L. R. 10 App. Cas. 59.

(a) S. 35.

action and recover damages' plainly points to a Common Law action—'then and in every such case the *person* who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured.' Well it is to my mind, as plainly as possible, a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the Common Law Courts, if the death had not ensued. . . . Every word of that legislation being, as it appears to me, legislation for the general case and not for particular injury by ships, points to a common law action, points to a personal liability and personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem*." Lord Blackburn, while agreeing on the question at issue, repeated his doubt (b) as to the correctness of the view that the word "damage" is to be restricted to injuries to property.

We have reviewed the decisions on this point at some length, because of their bearing on the next question to be considered, viz :

II. Damage to person, where the person injured is the plaintiff. There is a marked distinction between such cases and those in which an attempt has been made to extend the provisions of Lord Campbell's Act to the Admiralty Court. In several cases claims of this kind have been entertained, and the Court appears to have originally had jurisdiction over such cases (c). In *The Sylph* decided in 1871 (d), the plaintiff was a diver, who while engaged in his occupation was caught by the paddle-wheel of a steamer and seriously injured. The Court (Sir Robert Phillimore) considering that the object of the Act was to extend its jurisdiction (e); and that jurisdiction had been exercised by Lord Stowell in several actions *in personam* against

(b) Expressed in *Smith v. Brown*, L. R. 6 Q. B. 729.

(c) *De Lovio v. Boit*, 2 Gallison 398.

(d) L. R. 2 A. & E. 24.

(e) *The Diana*, Lush. 540; *The Malvina*, Lush. 495; *The Uhla*, L. R. 2 A. & E. 29, note 1.

captains of vessels for personal injuries inflicted on seamen or passengers at sea (*f*), entertained the suit (*g*).

In *The Beta* (*h*), the Privy Council sustained a similar judgment pronounced by the same Judge, holding that the Court had jurisdiction over the claim of the mate on board the *Xiste* for personal injuries sustained by him in a collision between his vessel and the *Beta*, occasioned by the fault of the latter vessel.

Doubt is cast upon the jurisdiction in such cases by the reasoning of Cockburn, C. J., in *Smith v. Brown* (*i*), where he says, referring to the statute (*j*), “Now the words used are undoubtedly very extensive; but it is to be observed that neither in common parlance nor in legal phraseology is the word ‘*damage*’ used as applicable to injuries done to the person, but solely as applicable to injuries done to property. Still less is the term applicable to loss of life or injury resulting therefrom to a widow or surviving relative. We speak, indeed of ‘*damages*’ as compensation for injury done to the person; but the term ‘*damage*’ is not employed interchangeably with the term ‘*injury*’ with reference to mischief wrongfully occasioned to the person, and that this distinction is not a matter of mere verbal criticism, but is of a substantial character and necessary to be attended to, is apparent from the fact that the legislature in two recent Acts, both having reference to the liability of ship-owners in respect of injury or damage, namely, the Merchant Shipping Act, 1854 (*k*), and the Merchant Shipping Act Amendment Act, 1862 (*l*), has in a series of sections carefully observed this distinctive phraseology, speaking in distinct terms in the same section of loss of life and personal injury on the one hand, and loss and *damage* done to ships, goods, or other property on the other. In those Acts the term ‘*damage*’ is nowhere used

(*f*) See cases cited *supra* p. 457.

(*g*) See also *The George and Richard*, L. R. 3 A. & E. 466.

(*h*) L. R. 2 P. C. 447.

(*i*) L. R. 6 Q. B. at p. 732.

(*j*) 24 Vict. cap. 10, sec. 7.

(*k*) 17 & 18 Vict. cap. 104, part ix.

(*l*) 25 & 26 Vict. cap. 63, sec. 44.

as applicable to injuries done to the person; it is applied only to property and inanimate things." In *Simpson v. Blues* (m), Brett, L. J., delivering the judgment of the Court (Willes, Byles, Brett and Grove, JJ.) expressed their concurrence in the "decision reasoning and observations" in *Smith v. Brown*. Again in *James v. London & South Western Railway Co.* (n), Kelly, C. B., expressed his agreement in the view taken in *Smith v. Brown*.

In the *Franconia* (o), Sir Robert Phillimore shews that in the Merchant Shipping Act the words 'damage' and 'injury' are used interchangeably, and that the former word was applied in the Court of Admiralty to suits for personal assault committed on the high seas, which were always described as causes of damage (p), but Bramwell and Brett, L. JJ., on appeal (q) expressed a general concurrence in the judgment and reasons in *Smith v. Brown*. Baggallay, L. J., however, shows that the word *damage* in the Merchant Shipping Act is not confined to injury to property. "So far, then," he says, "from there being no legislative sanction for the use of the word 'damage' as denoting injury to the person, and from the legislature having adopted the use of the word as exclusively applicable to property, it appears to me that the very statutes referred to as supporting these propositions, afford intrinsic evidence to the contrary." He refers also to the use of the word in cases of personal injury by assault.

In the *Vera Cruz* (r), Brett, M. R., expressed his opinion that section 7 of 24 Vict. cap. 10, is intended to give jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by a ship. "*I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship.*"

(m) L. R. 7 C. P. at p. 300.

(o) L. R. 2 P. D. pp. 168-169.

(q) L. R. 2 P. D. p. 170.

(n) L. R. 7 Ex. 195.

(p) See cases cited at p. 457.

(r) L. R. 9 P. D. 88.

Bowen, L. J., was of opinion that "damage done by a ship" means done by those in charge of a ship with the ship as the noxious instrument (s). Fry, L. J., was of opinion that *damage* does include injury to the person, for the reasons given by Baggallay, L. J. in the *Franconia* (t) and based his decision against the claim under Lord Campbell's Act on other grounds. In the House of Lords (u) the judgment of Lord Selborne makes no reference to the arguments in the previous cases respecting the limitation of the meaning of the word *damage* to injury to property, but decides the case on other grounds, and Lord Blackburn said (v), "if the question now raised had been whether personal damage to a man who lived, was within that 7th section of the enactment, I should have had some doubt about the matter, and it would have carried me so far that if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other."

It will be observed that in all the cases which have come before the High Court of Admiralty, in which the claim was for personal damage, not resulting in death, made by the party injured, the jurisdiction has been sustained, and that the ultimate decision against the jurisdiction in cases under Lord Campbell's Act, proceeds on grounds which do not affect this question, and the reasoning in *Smith v. Brown*, restricting the term 'damage' to injury to property, has been fully met by the arguments of the Judges in later cases.

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ST. CATHARINES.

(s) Page 101.

(t) 2 P. D. 163.

(u) *The Vera Cruz*, L. R. 10 App. Cas. 59.

(v) Referring to *Smith v. Brown*.

(To be concluded.)

with and comprehensive grasp of legal principles ; all these and other estimable qualities, characteristic of him as a judge and a man, have made his death a public calamity. That he should have been cut down in the prime of life and usefulness, when the bench, the bar and the public had expected from him many years of active achievement and judicial work is especially to be lamented. A blank has been made in the profession not easily to be filled.

The members of this society, comprised of the judges and profession of Nova Scotia, resolve to attend the funeral of Mr. Justice Rigby in a body, and to wear mourning for one month.

Further resolved, That this resolution be duly published, and that a copy hereof be transmitted by the president to Mrs. Rigby, with an expression of the society's deep sympathy with her in the bereavement she has sustained."

Mr. Justice James seconded the resolution and endorsed the sentiments contained in the remarks of the president. Mr. Justice McDonald had known the late judge from the time of the commencement of his legal studies until he last sat on the bench. As a student he was industrious, intelligent and active ; as a lawyer he was profound, faithful and just to both parties, and in his career as a judge he manifested all those qualities necessary to make a successful judge, with benefit to his country. Remarks followed from Judge Smith, Attorney-General Longley, Hon. S. L. Shannon, and Messrs. Pryor, Lynch, Henry, McCoy and White.

Mr. Justice Rigby was forty-four years of age, having been born at Sydney, C. B., in September, 1842. He pursued his law studies in Halifax in the office of Hon. J. W. Ritchie, the late judge in equity, from 1858 to 1863, and was called to the bar in the latter year. He practised his profession in partnership with the present Chief Justice at Pictou, and subsequently with S. H. Holmes. In 1872 he removed to Halifax, again entering into partnership with Mr. McDonald, C. H. Tupper becoming a member of the same firm in 1877. When the senior partner was elevated to the bench Messrs. Rigby and Tupper remained in partnership until the end of 1881, when Mr. Rigby

was elevated to the bench, and the new law firm of Graham, Tupper & Borden was established. It is a coincidence to be noted that Judge Rigby sat on the bench with both Hon. J. W. Ritchie and his brother J. N. Ritchie, with whom he studied law; and with his old partner, the present Chief Justice.

It is said of the late learned judge that, in addition to his sagacity and knowledge of law, he possessed not only a calm and equable temper, but also that inestimable virtue—ability to listen to and follow counsel, without attempting to embarrass them by interruptions and to lead the argument.

Pleading a Joinder of Issue.

The case of *Hare v. Cawthorpe*, 11 P. R. 353, just reported, though decided in May last, establishes a rule of pleading which, to say the least, is open to criticism. The point in question was whether a joinder of issue was a proper defence to a counter-claim. Such a pleading was delivered in order to enable the plaintiff to give notice of trial.

In order to arrive at a conclusion, the Court was constrained to determine whether or not a joinder of issue pleaded to a statement of claim would be a proper defence—the counter-claim being in fact a statement of claim by the defendant. The Court found no difficulty in answering the question in the affirmative. “The old rules and names of pleadings,” says Mr. Justice Rose, who delivered the judgment of the Common Pleas Division, “have been abolished by the Judicature Act. Words, therefore, in a statement of claim or defence must be taken in their ordinary meaning.” This logic, we venture to say, is not invincible. A more correctly stated proposition would be as follows:—The old rules and names of pleadings have been abolished by the Judicature Act. New rules and names of pleadings have been substituted by that Act. Words therefore in a statement of claim or defence must have the signification attached to them by that Act. Now a joinder of issue was before the Act a purely technical pleading; and that sense has not been

taken away from it by the Act. The pleadings are statement of claim, statement of defence, reply, joinder of issue and demurrer. Rule 160 says that a defendant shall deliver his "defence" within eight days from delivery of the statement of claim. Rule 178 states that a plaintiff shall deliver his "reply" within three weeks after the "defence." Rule 174 declares that no pleading subsequent to "reply" other than a "joinder of issue" shall be pleaded without leave. Here is as technical a distinction between the names of pleadings, and as technical a code of rules for pleading as ever existed, simple though they may be.

The conclusion drawn from the opening words of Rule 176 by the Court is not, we venture to think, justified by them. "As soon as either party has joined issue upon any pleading of the opposite party etc." "Pleading" includes "statement of claim." Therefore a defendant may join issue upon the statement of claim. This reasoning will not bear the test of logic, though it may perhaps pass unscathed through the tribunal of "ordinary conversation" to which the whole point in controversy was submitted by the Court. It is possible under this decision to reduce the "pleadings" in an action to a notice in lieu of statement of claim and a joinder of issue—the issues to be tried thus being left as indefinite, and the field for loose swearing as wide, as possible.

Hitherto a rule has been observed which had a great deal to recommend it. An illustration will best explain it. To an action for rent the defendant denies the allegations in the claim, and sets up that the lease was obtained by fraud. "And repeating the allegations in the defence, the defendant by way of counter-claim asks that the alleged lease may be declared void." To this a pleading other than a joinder is unnecessary, because the facts are put in issue, and the counter-claim for cross relief is based upon the facts of the defence. But if the defendant, besides denying the plaintiff's claim, counter-claimed for debt on a judgment, and asked that he might have judgment for what was due thereon, he had a right to know how the plaintiff would meet his claim. And to such a counter-claim a pleading

was necessary. He had a right to know whether he was to prove his judgment by producing the record, or whether he was to be charged with fraud in obtaining it whereby it was void, or whether he must be prepared for a plea of satisfaction. A joinder of issue pleaded to such a claim leaves it a matter of doubt how far the party pleading it may go in his defence.

Inverted Equity.

There is an old rule about incumbrances upon land, that you must redeem upwards and foreclose downwards. It originated in Equity. But on being introduced into a Court of law (the assumption that Courts of law still exist is not a violent one) the rule has been turned upside down; and it is now laid down by the Queen's Bench Division that you must redeem downwards, with the correlative liability of being foreclosed upwards if you don't.

The case of *Weir v. The Niagara Grape Co.*, 11 Ont. R. 700, was a case in which the plaintiff, a purchaser in fee simple without notice of an unregistered agreement which charged the land, registered his conveyance first. The defendants held the agreement without registering it for a number of years, but registered it after the plaintiff's deed. "Such agreement must therefore be, under section 74 of the Registry Act, adjudged fraudulent and void against the plaintiff." Having thus settled the titles of the parties, by declaring that the defendants were claiming under a fraudulent and void instrument, and that the plaintiff was claiming the fee unincumbered under a valid instrument, the Court proceeded to administer Equity. "I think the plaintiff entitled to a decree declaring that the deed of the 31st of March, 1884 [the plaintiff's conveyance] has priority over the agreement of the 7th of February, 1882 [the defendant's agreement]; but this relief is only granted upon the terms precedent thereto, that the plaintiff shall pay to the defendant [the amounts due under the agreement], and the defendant shall be entitled to this relief against the plaintiff whether the plaintiff accepts the relief granted to him or not."

On the same principle may not a second mortgagee demand to be redeemed by a prior mortgagee, and get this relief whether the prior mortgagee accepts the "relief" thereby offered him or not? And have not all persons who sleep on their rights a substantial claim to have them asserted at the expense of the watchful, under the maxim *Dormientibus non vigilantibus B. R. subrenit*?

Filing Reports.

The judges of the Chancery Division, having had under their consideration the proper construction of Rule 599, have come to the conclusion that reports should not be filed in the offices of the Masters, but that the same should be filed in the office of the Local Registrar; or, where there is no Local Registrar, in the office of the Deputy Clerk of the Crown when the action in which the report is made is in the Queen's Bench or Common Pleas Division, or when the action is pending in the Chancery Division in the office of the Deputy Registrar at the place where the Master making the report holds office, irrespective of the place where the writ issued; and therefore, in future, reports will be required to be filed in accordance with the practice above indicated before being acted on in the accountant's office, unless confirmed by special order.

Lewin v. Wilson.

In the remarks on this case at p. 422 of this volume, it appears that the reference to Mr. Justice Strong's judgment is susceptible of the construction that that learned judge based his dissenting judgment upon the sole ground that Howe was the agent of White to make payments. A reference to the report, 9 S. C. R. 646 will show that this is not correct. Mr. Justice Strong expressed the opinion on the other branch of the case which was afterwards declared by the judicial committee to be the correct one.

Our reference to the point of agency was merely intended to show that it was not passed upon by the Committee. Compare *Forsyth v. Bristowe*, 8 Ex. 716 on a cognate question.

The New Examiner.

Mr. R. E. Kingsford has been elected by the Benchers Examiner and Lecturer in mercantile law, contracts, evidence and practice, in the place of Mr. Delamere who resigned.

BOOK REVIEWS.

A Manual on the Law affecting Voters' Lists for legislative and municipal elections in Ontario, containing the Voters' Lists Act, etc., with an appendix, containing the opinions of the Judges of the Court of Appeal on cases under the Voters' Lists Acts; and a schedule of forms. By THOMAS HODGINS, Q.C., editor of "Hodgins' Election Cases," "Canadian Franchise Act," etc. Second edition. Toronto: Carswell & Co., 1886.

Supplement of the Canadian Franchise Act, 1885, containing the amending Act of 1886, (49 Victoria, chapter 3), with explanatory notes, by THOMAS HODGINS, M.A., one of Her Majesty's counsel, and editor of "Hodgins' Election Cases," "Manual on Voters' Lists," etc. Toronto: Rowse & Hutcheson, 1886.

These two books with the Canadian Franchise Act, 1885, form a group for which all those who have anything to do with elections may feel grateful. They are compiled with great industry, the notes being very full, and containing not only such information as may be of immediate use with regard to the Voters' List, but also a variety of law on many subjects connected with property.

Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure, and the law of summary convictions, with table of offences, their punishments and statutes: tables of cases, statutes, etc. By SEYMOUR F. HARRIS, B.C.L., M.A. (Oxon.), author of "A concise Digest of the Institutes of Gaius and Justinian." Fourth edition. By AVIET AGABEG, of the Inner Temple, and of the Northern Circuit, Barrister-at-Law. London: Stevens & Haynes, 1886.

This book runs through an edition with great rapidity, the last edition having been published in 1884. Its established reputation both as a book of reference and as a text book leaves nothing more to be said of it.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[8TH SEPTEMBER, 1886.]

WILKINS v. McLEAN.

Reasons against appeal—Delay.

Reasons of appeal were delivered by the appellant's solicitors in August, 1885. The case in appeal was delivered by them for settlement in September, 1885. The respondent failed to deliver reasons against the appeal, and the appellant's solicitors, after granting him considerable indulgence, deposited the appeal case without reasons against the appeal, and entered the appeal for hearing at the sittings of the Court in May, 1886. The appeal did not then come on, and now stood upon the September list.

H. Cassels, for the respondent, applied for leave to deliver reasons against appeal, comprising also a notice of intention to cross-appeal on grounds stated.

Moss, Q.C., for the appellants, contra.

Osler, J.A., granted the application, holding that inasmuch as the powers conferred on the Court by the Court of Appeal Act were not diminished by the omission to give such notice of intention to cross-appeal, the reasons as presented should be admitted in spite of the delay, unless the appellants could show that some substantial harm would be done to them in the prosecution of their appeal by now allowing these reasons to be filed, and this not being shown, his Lordship made an order accordingly, the respondent being ordered, however, to pay the costs of the application.

H. C.

High Court of Justice.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 11TH SEPTEMBER, 1886.]

McLACHLIN v. GRAND TRUNK RAILWAY COMPANY.

Railway—Overhead bridge—Accident—Liability.

Action to recover damages for injuries sustained by the plaintiff by reason of a bridge being less than seven feet above the top of the freight car on which the plaintiff was employed while in the service of the defendants. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should "take over all the lines of the Midland Railway Company, buildings, rolling stock, stores and materials of all kinds, and shall during the continuance of this agreement well and efficiently work the said lines and keep and maintain them with all the works of the Midland in as good repair as they are when so taken over." The agreement was to be in force for twenty years. The Midland Railway Company, though incorporated under 44 Vict. cap. 67 (O.), was brought under the control of the Parliament of Canada, by 46 Vict. cap. 24 (D), passed in 1883, before the agreement was executed. By the Act of 1881, amending the Consolidated Railway Act, 41 Vict. cap. 24, sec. 3 (D), "Every bridge or other erection or structure under which any railway passes, existing at the time of the passing of this Act, of which the lower beams are not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be reconstructed or altered within twelve months from the passing of this Act, so as to admit of such open and clear headway of at least seven feet; such bridges shall be reconstructed or altered at the cost of the Company, municipality, or other owner thereof, as the case may be," etc.

Held, Galt, J., dissenting, that the defendants were not liable for the injury sustained by the plaintiff.

Barron, for the plaintiff.

Osler, Q.C., for the defendants.

 McQUAY v. EASTWOOD.
Surgeon—Malpractice—Evidence—Inconsistent findings of jury.

In an action against the defendant, a surgeon, for malpractice, the jury, by one finding, found that the defendant was guilty of negligence in his treatment in not giving instructions to the nurse; and by another, in not seeing that his instructions were properly carried out.

Held, that these findings were clearly inconsistent; but their inconsistencies would not entitle the defendant to judgment dismissing the

action, but at most to a new trial, if there was evidence that ought to be submitted to the jury on either branch of the findings. But

Held, on the evidence, that the findings could not be supported; and judgment was entered for the defendant dismissing the action.

McEWAN v. DILLON.

Landlord and tenant—Breach of contract—Damages, measure of.

Action by the plaintiff, the lessee, against the defendant, the lessor, for breach of the covenants contained in a lease to dig certain ditches, etc. At the trial the learned Judge, in fixing the amount of the plaintiff's damage, held that the measure was the difference between the rentable value of the demised premises with the defendant's covenants performed and the improvements made, and their value without such improvements.

Held, Cameron, J., dissenting, that this ruling was correct.

The learned Judge at the trial directed that if certain improvements were made the damages were to be reduced thereby. On its being shown to the Divisional Court that these improvements had been made the damages were reduced accordingly.

Musgrove, for the plaintiff.

Allan Cassels, for the defendant.

McLENNAN v. WINSTON.

Contract—Breach—Evidence.

The plaintiff set up a contract alleged to have been made between the plaintiff and defendants, whereby the plaintiff was to cut and lay down 25,000 railway ties at 24 cents per tie on the defendant's limit to be delivered thereon; that after the making of the contract the plaintiff procured an outfit to enable him to carry out the contract; and the plaintiff was put to loss of time in procuring the same; that the defendant refused to carry out the contract, whereby the plaintiff sustained damage; that it was further agreed that the plaintiff should ship the outfit to Port Arthur to the care of R., and on the arrival of the same the plaintiff should report and receive instructions as to the means and way of forwarding the outfit to the defendants' limit, etc., and that though the plaintiff shipped the outfit, etc., the defendants refused and neglected to give the instructions, whereby the plaintiff was damaged.

Held, assuming that a contract as alleged was proved, that the evidence showed that the breach was on the part of the plaintiff and not of the defendants; and therefore the action failed.

Schoff, for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

LANDRY v. THE CITY OF OTTAWA.

By-law—Application to quash—Single Judge—Divisional Court.

An application to quash a by-law may and ought to be made to a single Judge, and not to the Divisional Court, unless some good reason is shown why the latter should entertain it.

McCarthy, Q.C., and W. H. P. Clement, for the motion.

James Maclellan, Q.C., contra.

TODD v. DUN.

Mercantile agency—Libel—Privilege.

The defendants, Dun, Wiman & Co., the proprietors of a mercantile agency, wrote to the defendant C. requesting him to advise them confidentially of the standing and responsibility for credit of the plaintiff, stating that he claimed that burglary had been committed on his premises and that he had lost from \$1,200 to \$1,600; asking if this were so, for full particulars, and whether there was not something wrong. The defendant replied that he had made enquiry and found that the general opinion was that the plaintiff was not robbed at all, and that what had been done he had done himself; at all events if he had been robbed, it was of not more than \$200 or \$300; that circumstances were against him; still he could not say. The defendants, Dun, Wiman & Co., subsequently issued a printed circular or notification sheet on which, after the plaintiff's name, were the words, "If interested, enquire at office." This was published and circulated amongst the defendant's customers in Canada and the United States, not more than three or four of whom had any interest in the affairs of the plaintiff. The circular also contained the following:—"The words, 'If interested, enquire at the office,' inserted opposite names on this sheet do not imply that the information we have is unfavourable. On the contrary, it may not infrequently happen that our last report is of a favourable character; but subscribers are referred to our office, because in justice to them, the parties reported, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report as we have it on our records." The words complained of, namely, "If interested, enquire at the office," were proved to have the effect of injuring the plaintiff. At the trial no attempt was made by C. to prove that the statements made in his letter were true, or that he made enquiries and found the general opinion to be as stated. In an action of libel, the jury found for the plaintiff.

Held, that the words charged were clearly libellous, and there was no privilege, for, as regards Dun, Wiman & Co., the Court was governed by *Lemay v. Chamberlain*, 10 Ont. R. 638, and the explanatory statement did not affect the matter; and as to C., his failure to prove the truth of the statement, or his belief therein, deprived him of any privilege.

Ritchie, Q.C., and McGillivray, for the plaintiff.

Osler, Q.C., and Lash, Q.C., for the defendant.

McCASKELL v. McCASKELL.

Rent charge—Rent service—Rent seck—Apportionment.

On 1st December, 1870, A. M. by deed conveyed certain land to his grandsons W. M. and D. M. as tenants in common; and on the same day an agreement was made between W. M. and D. M., and A. M., whereby W. M. and D. M. agreed to pay the following sums of money and fulfil the written agreement, namely that W. M. and D. M. should thenceforward support their mother, M. the plaintiff, and furnish her with reasonable, suitable and comfortable board, lodging and clothing and medical attendance when required at all times when necessary during the remainder of her natural life; and should treat her at all times with proper respect and regard, and maintain her in a proper manner; and in the event of any disagreement arising between the said W. M. and D. M. and their mother, so that she would be obliged to leave the said premises, then they should only be obliged to pay her \$55 a year in lieu of board, lodging, clothing and attendance; and that the said payment should be recovered by suit at law if not paid when due; and that it was thereby agreed and understood that the said covenants, payments and annuities should thenceforth be chargeable against the said lands so conveyed as aforesaid. The plaintiff was no party to the agreement. On 4th October, 1872, the defendant W. M. for a nominal consideration of \$1,000 conveyed his undivided half interest to the plaintiff, of which she had no knowledge. Subsequently, on 1st March, 1877, the plaintiff reconveyed the same to D. M.

Held, that the agreement did not create a rent charge, as no power of distress was conferred; if a rent service or rent seck there would be a right of distress; but if neither, but a covenant charged on land, performance of it would be decreed; that upon the conveyance by W. M. to the plaintiff the whole charge was not extinguished, but an apportionment took place; and the plaintiff was entitled to enforce performance as against D. M.'s undivided interest.

Reeve, Q.C., and McGillivray, for the plaintiff.

Marsh, for the defendant.

[O'CONNOR, J.]

McDOUGALL v. HALL.

Deed—Omission to tender for execution before action brought—Evidence that execution would have been refused—Dispensing with tender.

The general scope of the Judicature Act, and especially sec. 16, s-s. 8 a, requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters avoided; so that, whenever a subject of controversy arises in an action, the Court should, if possible, determine it so as to prevent further and useless litigation.

In this case, where there should in strictness have been a tender of a conveyance for execution before action brought, but no such tender was made, the defendant, in his defence, though setting up the evidence of such a tender, at the same time indicated that, if it had been made, he

would have refused to comply therewith, and the tender would therefore have been futile.

Held, that judgment should be entered for the plaintiff, notwithstanding the want of a tender.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 22ND SEPTEMBER, 1886.
In re FLEMING.

Executor—Compensation—Commission—R. S. O. cap. 107, ss. 27, 41.

The judgment of Ferguson, J., 11 P. R., 272, *ante* p. 85, was reversed on appeal.

Per Boyd, C., who delivered the judgment of the Court.

The right to compensation in this case depends entirely upon the Statute, which declares that a trustee or executor shall be entitled to a fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate. The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits according to the sound discretion of the judge, who is to regard the care, pains, etc., expended by the claimant. Nor have the Courts laid down any inflexible rule in this regard. While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of any hard and fast commission (such as 5 per cent.) would defeat the intention of the statute. There was no duty cast upon the applicant by the so-called precatory clauses of the will which required him to act against the interests of his co-executor. In other respects the risk or responsibility which attached upon him as compared with his co-executor is not very appreciable, inasmuch as, subject to the charge in favour of the widow, the whole estate was practically at home in the hands of his co-executor on the death of the testator.

The Master's Report was therefore restored without costs, as the appellant had failed in his cross-appeal to diminish the sum given by the Master.

Thompson v. Freeman, 15 Gr. 384, referred to.

A. C. Galt, for the appeal.

S. H. Blake, Q.C., and *Goodwin Gibson*, contra.

IN CHAMBERS.

[WILSON, C.J., 24TH SEPTEMBER, 1886.

In Re WOLTZ v. BLAKELEY.

Prohibition—Division Court—Order for imprisonment—Division Court Clerk.

Held, that in an order made by a Division Court judge upon judgment summons, for payment of the judgment debt within a certain time, a clause directing that the judgment debtor should be imprisoned, unless he paid the debt within the time limited, was beyond the jurisdiction of the judge; and prohibition was ordered as to that part of the order.

Semble, That the defendant should have called upon the Clerk of the Division Court to show cause against the issuing of any order for imprisonment, as he was the person alone to act upon the order made.

Reeve, Q.C., for the motion.

Aylesworth, contra.

[CAMERON, C. J., 2ND SEPTEMBER, 1886.]

McDONELL v. THE BUILDING & LOAN ASSOCIATION.*Costs, scale of—Illegal distress—Injunction—Damages—Subrogation—County Court—Equity side of.*

The plaintiff claimed to have it declared that a certain distress made upon his goods by the defendants, under a clause in their mortgage, was illegal and void, that it should be set aside, that an interim injunction obtained by the plaintiff to restrain the sale of the goods distrained should be made perpetual, that the plaintiff should be paid \$200 damages for the illegal distress, or, in the event of the Court holding the distress legal, that the plaintiff should be declared entitled to the defendants' mortgage security to the extent of the value of the goods sold.

The judge at the trial found in favour of the plaintiff, made the injunction perpetual, and assessed the damages at \$25, with full costs against the defendants.

The Common Pleas Divisional Court reversed this judgment and dismissed the action, with costs.

Held, that the action was not one that could formerly have been brought under the equity jurisdiction of the County Court, although the arrears of rent and the damages found by the judge at the trial were less than \$200; and that the costs should therefore be taxed on the High Court scale.

D. Armour, for the plaintiff.

Allan Cassels, for the defendants.

[GALT, J., 15th June, 1886.]

COLQUHOUN v. McRAE.*Sheriff—Seizure—Sale—Fees—Poundage.*

A sheriff under a writ commanding him to levy \$630 and accruing interest out of the goods of the defendants, seized some wheat, but did not remove it or put any person into possession, taking a bond for its safe keeping and delivery to him when demanded. No day for sale was fixed, nor were notices of sale posted or prepared when the sheriff received a letter from the plaintiff's solicitor directing him to withdraw the seizure upon payment by defendant of his fees and charges. The sheriff accordingly notified the defendant of his withdrawal and obtained payment of his fees and poundage claimed, \$52, from the defendant, but under protest. No money except this passed through the sheriff's hands, and he made no levy.

Held, affirming the decision of the Local Judge at Pembroke, that the sheriff was not entitled to poundage under the circumstances, but he was allowed \$10 in lieu of poundage and \$8.68 for fees and expenses, and was directed to refund the balance of the \$52 received.

Held, also, that the sheriff was not entitled to retain the amount ordered to be refunded for the purpose of applying it on another execution against the defendant.

Holman, for the sheriff.

Aylesworth, for the defendant.

[PROUDFOOT, J., 21ST SEPTEMBER, 1886.]

*In re O'HERON.**Insurance—Benevolent Societies—47 Vict. cap. 20 (O.)—R. S. O. cap. 167.*

The Statute 47 Vict. cap. 20, (O.) does not apply to Benevolent Societies incorporated under R. S. O. cap. 167, and not authorized to do business as insurance companies.

John Hoskin, Q. C., for infants.

Hoyles, for executor.

MORROW v. CONNOR.

Jury notice—Qui tam action—Municipal councillors—Trustees—Exclusive jurisdiction of Court of Chancery.

The action was by two ratepayers of A. on behalf of themselves and all other ratepayers against all the members of the Municipal Council of A., charging them with continuing with knowledge a defaulting treasurer in office, and causing loss to the municipality, and charging fraudulent collusion with the treasurer.

Held, that in charging the defendants it was not necessary to use the word "trustees," if in fact it appeared that they were trustees, and the law attaches the character of trustees to municipal councillors. The action was one within the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper.

Semble, the municipal corporation should have been made parties, and the action should have been on behalf of all ratepayers except the defendants.

W. H. P. Clement, for the plaintiffs.

A. H. Marsh, for the defendants.

[23RD SEPTEMBER, 1886.]

McBEAN v. McBEAN.

Reference—Account—Withdrawing admissions.

In the course of a reference to take partnership accounts, admissions of certain items in the plaintiff's account were made by the solicitor for the defendant, G. McB. After the death of the solicitor, G. McB. applied to be allowed to withdraw the admissions, swearing that he had not authorized them and that the admitted items were not properly chargeable against him. No report had been made, and the other parties had not altered their position in any way by reason of the admissions.

Held, that so rigid a rule as that a party should never be allowed to withdraw admissions, could not be laid down, and G. McB was allowed

to attack the items admitted, they to be regarded as *prima facie* correct and the *onus* of displacing them to be upon G. McB.

S. H. Blake, Q. C., for G. McB.

Hoyles, for the plaintiff.

D. W. Saunders, for the defendant D. McB.

[29TH SEPTEMBER, 1886.]

THE BANK OF B. N. A. v. THE WESTERN ASS. CO.

Discovery of fresh evidence—Opening publication—Powers of trial judge.

At the trial, 25th June, 1884, Proudfoot, J., found that the plaintiffs were not entitled to recover a sum of £1,500 stg. from the defendants (7 Ont. R. 166).

Held, that Proudfoot, J., now sitting in Court, had power to entertain a motion to open up the judgment, and to put in further evidence, and for a new trial, upon the discovery by the plaintiffs of fresh evidence as to the £1,500; or in the alternative for leave to bring a new action for the £1,500.

Synod v. De Blaquiere, 10 P. R. 11, followed.

S. H. Blake, Q. C., for the plaintiffs.

McCarthy, Q. C., and *A. R. Creelman*, for the defendants.

[ARMOUR, J., 11TH SEPTEMBER, 1886.]

TOMLINSON v. THE NORTHERN RAILWAY CO.

Third party—Costs—Indemnity—Rules 107, 108.

The defendants were sued as carriers for the loss of certain horses which they had contracted to carry from T. to W., partly by their own line and partly over the lines of other carriers. The loss occurred while the horses were being carried by the C. L. S. T. Co., with whom the defendants had stipulated that all loss in transit should be paid for by the parties in whose custody the loss occurred.

The defendants served notice on the C. L. S. T. Co., claiming indemnity from them as third parties under Rules 107 and 108, to which the latter appeared, and an order was made allowing them to intervene and assist the defendants in disputing the plaintiffs' claim against the defendants, and that they should be bound by the result.

The plaintiffs were non-suited at the trial.

Held, that the plaintiffs were not the authors of the litigation with the third parties, and should not be ordered to pay the costs occasioned by adding them as parties.

W. H. P. Clement, for the plaintiffs.

Boulton, Q.C., for the defendants.

Tilt, Q.C., for third parties.

[ROSE, J., 1ST SEPTEMBER, 1886.]

THOMAS v. STOREY.

Examination of plaintiff before trial—Issue of forgery or personation—Ex parte order.

No order of any moment should be made *ex parte*, except in a case of emergency.

The principal issue was as to a certain instrument, upon which the defendant relied, which the plaintiff claimed was obtained either by forgery of the plaintiff's name or by personation of the plaintiff.

Held, that no order should be made for the examination of the plaintiff before the trial, which would save him from personal attendance and examination before the Court and jury.

Holman, for the plaintiff.

Aylesworth, for the defendant.

[THE MASTER IN CHAMBERS, 28TH SEPTEMBER, 1886.]

SHERWOOD v. GOLDMAN.

Writ of summons—Indorsement of plaintiff's residence—Irregularity.

The words: "This writ was issued by E. F., of _____ solicitor for the said plaintiff, who resides at _____," in the form required by the Judicature Act mean that the plaintiff's own residence is to be indorsed on the writ of summons, and a writ without such indorsement is irregular.

Small, for the defendant.

Baird, for the plaintiff.

NOVA SCOTIA.

In the Supreme Court.

[4TH AUGUST, 1885.]

ROBERTSON v. WILLIAMS.

Absent or absconding debtor—Summons to agent to disclose property—Right of judgment creditor to choses in action—Construction of words "goods and credits in the possession or under the control" of agents.

H. McK. was summoned to appear and be examined as to whether or not he was agent or trustee of the defendant, an absent or absconding debtor, and as to whether he had goods or credits of such defendant in his possession or under his control.

Defendant had made an assignment to H. McK. for the benefit of creditors, including a debt due by C. Bros. At the time of the issuing of

the summons, H. McK. had no money of the defendant's in his hands, but two days afterwards C. Bros. paid the amount due by them. All of defendant's creditors who had executed the assignment had previously been paid in full.

Held, that the debt due by C. Bros. to defendant was, in McK's hands, covered by the words of the Act, "goods and credits of the absent or absconding person then in his possession or under his control," and that plaintiff was entitled to execution therefor.

CITY OF HALIFAX v. THE WESTERN ASSURANCE CO.

Provincial Legislature—Power to authorize the imposition of license fees on Insurance Companies—Construction of British North America Act, section 92, sub-section 9.

The Provincial Acts of 1883, chapter 28, section 23, provided that in the case of Insurance Companies doing business in the city of Halifax, the properties of the companies within the city should be liable to assessment in the same way as the property of other ratepayers, and also that every such company should, in addition thereto, pay an annual license fee, and that where any company was engaged in more than one branch of business, it should pay a license fee for each branch of its business.

Held, that the right to empower the imposition of such license fees, was within the powers of the Provincial Legislature, under section 92, sub-section 9, of the British North America Act.

FORSYTH v. BELL.

Representation as to ownership of goods—Transfer of title by delivery—Estoppel—Trading voyages.

Plaintiff was in the habit of supplying H. with money and goods for trading purposes on the condition that all goods procured by H., by way of purchase or exchange, were to be delivered to plaintiff who was to sell them to pay his advances. G. having obtained judgment against H. was about to levy on a schooner belonging to H. in which plaintiff had an interest and which he was about to sell, when he was induced to abstain from doing so by plaintiff, who informed him that the schooner *Eastern Clipper* was then in Guysboro, that the goods on board were those of H. and that he could levy upon them there, or wait until the vessel came to Halifax. G. failed to levy on the goods then on board of the *Eastern Clipper*, but caused a levy to be made on a cargo which arrived at Halifax four months afterwards, and which had been procured in the same way. On the evening previous to the levy, H. had gone to plaintiff's office and there made and delivered to plaintiff's bookkeeper a memorandum in the form of a bill of lading of the goods, and had received instructions where to land the goods. He went to the place indicated and was preparing to land the goods when they were levied upon by the sheriff.

Held, that what occurred in plaintiff's office was a delivery of the cargo to plaintiff, and that the latter was not estopped by his representation to G. from taking the transfer of the goods.

McDonald, C.J., and McDonald, J., dissented.

THE HALIFAX BANKING CO. v. THE DOMINION SALVAGE
AND WRECKING CO.

Courts of one Province cannot restrain proceedings in Courts of another Province—Proceedings by liquidator of insolvent company to restrain sale of goods by execution creditor—Laches.

The plaintiff having commenced proceedings against the defendant company, under the Act of the Province of Nova Scotia relating to the service of process on companies out of the Province, obtained judgment and issued execution under which the sheriff levied upon certain property of the defendant within the Province. The defendant company, which was incorporated under an Act of the Dominion Legislature, and had its head office at Montreal, in the Province of Quebec, having become insolvent, was placed in liquidation, and an order was obtained by the liquidator from the Superior Court of Quebec, restraining the sheriff from proceeding to sell under the execution.

The order was served after the seizure and before the sale, but the sheriff proceeded notwithstanding to sell; subsequently the liquidator interposed in the suit brought by the plaintiff against the defendant company, and obtained a rule to have the execution and all proceedings under it set aside.

From the time of the issue of the execution with the liquidator's knowledge down to the application for the rule, two months had elapsed during which time several steps had been taken.

Held (i), that the Quebec Court had no power to interpose in the suit between the plaintiff and the defendant. (ii) That the liquidator had no power to interpose in the suit between the plaintiff and the defendant. (iii) That even if the liquidator could have so interposed, he must have failed on account of laches.

McDonald, C.J., dissented.

RUMSEY v. CUNNINGHAM.

Action brought by assignee in name of assignor—Proof of sale and delivery—Account stated—Admission.

R. & J. assigned to G. & T. who assigned to plaintiff. The assignments included a debt due by defendant for goods sold and delivered. Plaintiff sued in the name of R. & J. To prove delivery a paper was put

in evidence which purported to be a bill of lading of the goods, but there was no sufficient evidence of the signature. An account was rendered defendant of the amount due R. & J., together with a demand of payment, by G. & T., the assignees. A copy of the account and notice, and a letter written by defendant to T. one of the assignees, in which he acknowledged receipt of the notice and made an offer to compromise, was also put in.

Held, Thompson and Rigby, JJ., dissenting, that there was no sufficient evidence either of goods sold and delivered or of account stated, to enable plaintiff to recover.

Per Thompson, J. Where an action is brought by an assignee in the name of the assignor and the assignment is pleaded, a replication is good setting up that the action is brought by the assignee.

FIELDING v. MOTT.

Application for mining areas—Conditions precedent to entry—Leases in unproclaimed districts—Limitation of number of areas—Irregularities in application—Signature of commissioner to lease—Construction of terms in Mines Act—Conflicting applications—Errors in description.

The provisions of the Mines Act for the appointment of arbitrators, the making of an award, and the payment of damages where a mining lease is obtained over private lands and no agreement is made with the owner, are conditions precedent to the right of entry.

Leases may be granted in unproclaimed as well as proclaimed districts.

The provision of the Act limiting the number of areas to be included in a lease is directory only, and disregard of it by the commissioner will not invalidate a lease.

It is too late to take exception to defects or irregularities in an application for a license to search, or in the license itself, after the application for the license has been received and acted upon, and a lease issued, unless fraud is shown upon the part of the licensee in respect of a matter material to his right to get a lease.

Where application is made for a license to search, and a lease is subsequently obtained without the license to search having actually issued, the non-issue of the license to search is no objection to the lease.

In signing a lease it is not incumbent upon the Commissioner of Mines to attach to his signature his title of office if the capacity in which he signs appears sufficiently from the body of the document.

The expressions "district" and "gold district" in the statute do not necessarily mean a "proclaimed gold district."

The fact that an application for a license to search conflicts with a previous application will not invalidate either the application or the subsequent lease, if, at the time of the granting of the lease, the first application has expired without having been acted upon.

Defendant's application described the areas applied for as "commencing at a birch tree marked A. D. and being on the east side of Salmon

river about five miles above the bridge." It appeared that the tree was 2000 feet distant from the river, and considerably less than five miles from the bridge in a direct line.

Held, that, the tree being otherwise sufficiently identified, the description was not vitiated by the errors as to locality and distance.

In re ESTATE OF DOOLEY.

Will—Appeal from judgment admitting to probate—Undue influence by spiritual adviser—Judgment below sustained.

Testator was a man of miserly habits who had lived for many years alone, and had accumulated considerable property. Two years before his death he was visited by a niece, his next of kin and nearest living relative in the same degree, who was informed by him that on his death all his property would go to her and her mother. Before returning home the niece obtained a promise from the priest, who was her uncle's spiritual adviser, that, in the event of her uncle's illness, he would write to her and inform her of the fact, so that she might return. The testator, having been seized with an illness which was likely to prove fatal, was advised by the priest to make a will as a means of being "better prepared to attend to his spiritual affairs." He was also advised that he would be "perfectly right in disposing of his property in any way he wished, not contrary to the moral law." A will was drawn up by a solicitor who was sent for for the purpose, leaving the whole of testator's property for religious and charitable purposes, with the exception of two small bequests, including one of \$50 to the niece. The niece was not sent for in accordance with the promise made to her, and she had no information of the existence of a will until after her uncle's death.

There being evidence as to the due execution of the will, and the capacity of the testator, and no evidence other than as stated of undue influence, pressure or inducement,

Held, that the appeal from the decision of the Judge of Probate, admitting to probate, must be dismissed with costs.

Weatherbe, J., dissented.

NEW BRUNSWICK.

In the Supreme Court.

PHILIP v. McLAUGHLIN.

Landlord and Tenant—Summary ejectment—Expiration of tenancy—Writ of restitution.

The Summary Ejectment Act (Con. Stat. cap. 83, sec. 22) does not apply where the landlord relies upon a surrender of the lease by the tenant, and not on an expiration of the tenancy.

Where the tenant has been turned out of possession, and the proceedings are afterwards quashed on appeal, the Court has no discretion as to awarding a writ of restitution.

SINCLAIR v. HOLLAND.

Timber driver—Where entitled to take charge of timber drive—Lien—Con. Stat. cap. 109.

In order to give a timber driver a lien on timber for services performed under the Consolidated Stat. cap. 109, it is necessary that the timber should be within the limits of the parish for which he was appointed at the time he first takes charge of it.

Ex parte RYAN.

Practice—Rule nisi granted by Judge at Chambers—Filing of papers.

It is the duty of a party obtaining a rule *nisi* for a *certiorari* from a Judge at Chambers, to file in the clerk's office the affidavits on which the rule was granted.

BOYER v. THE TOWN OF WOODSTOCK.

Principal and agent—Municipal corporation—Committee appointed with specific duties—Extent of authority.

The B. Co. contracted with the town of Woodstock to construct in the town a system of Water Works, and agreed to construct the works, and furnish all materials, and to do everything necessary for their complete construction, and for placing them in readiness to be used. The town council appointed a committee to superintend the performance of the work under the contract.

Held, that the power of the committee was limited to superintending the work, and that they had no authority to bind the town by ordering extra work.

MANITOBA.

In the Queen's Bench.

DULMAGE v. DOUGLAS.

Constitutional law—Law Stamps Act—Ultra vires.

Since the Act of last session, the Statutes relating to stamps upon legal proceedings are no longer *ultra vires*.

The imposition of fees by law stamps is undoubtedly an indirect tax.

Under sub-sec. 2 of sec. 92 of the B. N. A. Act, the Provincial Legislature has not the power to impose such tax in order to raise a revenue for the general purposes of the Province.

The Acts of the Manitoba Legislature may be considered within the scope of sub-sec. 14 of sec. 92 of the B. N. A. Act, and not conflicting with the express provisions of sub-sec. 2.

THE MANITOBA & N. W. R. CO. v. ROUTLEY.

Interpleader issue—Abandonment by execution creditor—Sheriff's fees.

A sheriff having made a seizure, and a claim having been made to the goods, an interpleader issue was directed. Security not having been given, the sheriff sold the goods. Before trial the plaintiff (the execution creditor) abandoned, and an order was made for payment by the plaintiff to the claimant and the sheriff of "their costs occasioned by said interpleader order and interpleader issue." This order was amended, and the plaintiffs were further directed to pay the sheriff's possession money and other expenses occasioned by the sale and the costs of the sale.

Upon appeal from the settlement of the sheriff's account.

Held, (i) that the sheriff was not entitled to poundage.

(ii) That the sheriff was entitled to possession money and other expenses by the terms of the orders, which had not been appealed from.

(iii) That under the circumstances the charge for possession money was not unreasonable; nor was \$2 a day too much to pay to a man for keeping possession.

(iv) A charge of \$2.40 for taking a man out of possession was disallowed.

(v) Adjournments of sale allowed at fifty cents each.

ARMIT v. THE HUDSONS BAY COMPANY.

Interpleader by defendant—Costs.

After declaration, the defendants obtained a summons under 48 Vict. cap. 17, sec. 54, calling upon various claimants to the fund sued for to maintain or relinquish their claims. All the claimants abandoned except the Imperial Bank, and an order was pronounced directing the defendants to pay the fund into Court after deducting their costs; that there should be no costs as to those who abandoned their claims; and that an issue should be tried between the plaintiff and the Bank. Upon settling the terms of this order the Bank also abandoned, and the order, instead of providing for an issue, directed the Bank to pay the plaintiff's costs deducted out of the fund. The claim of the Bank was under two garnishee attaching orders, one issued in a suit against D. K. and A. and the other in a suit against T. K. and M. K. The Hudson Bay Co. in both suits being the garnishees. The plaintiffs in the present suit were T. K. and A.

Held, that the statute was applicable to the Bank's claim, and that an issue might therefore have been directed. The defendants were entitled to deduct their costs both of the suit and also of the application so far as related to the Bank, but not of calling in the other abandoning claimants.

Where a claimant does not appear, or appears and abandons, no costs are awarded.

MARTEL v. DUBORD.

Foreign judgment—Judgment in default of plea—Setting aside judgment—Interest.

A foreign judgment constitutes a simple contract debt. Judgment by default, therefore, may be signed in an action upon a foreign judgment; and also for the costs of a motion made in a foreign action.

Final judgment, in default of a plea to a declaration upon the common counts, cannot be signed unless particulars have been furnished, and *quære*, even if such particulars have been served.

The special endorsement upon a writ serves as particulars under the common money counts of the declaration; and no further particulars can regularly be delivered without a judge's order.

Judgment in default of a plea cannot include interest subsequent to the issue of the writ, although judgment in default of appearance may.

Judgment in default of a plea having been signed for \$4.95 too much, it was set aside and not merely reduced by that amount, a meritorious defence being sworn to.

WARNER v. HOUSLEY.

Exemption—Married women—Fi. fa. lands—Decree to enforce before return of fi. fa. goods.

The defendant, a married woman, owned a building subject to a mortgage. She occupied a part of it as a house (her husband living elsewhere) and rented the remainder to another for use as a shop. There were separate entrances to the two portions of the building.

Upon a bill to enforce a registered judgment obtained against the defendant,

Held, (i) that the portion occupied by the defendant was exempt from seizure or sale.

(ii) That the portion rented was not exempt.

(iii) That the mortgage should be apportioned.

(iv) Reference to the master to ascertain exactly the portions occupied and rented and to apportion the mortgage.

(v) A *fi. fa.* goods must be returned before sale under *fi. fa. lands*, but not necessarily before a decree can be made to enforce the statutory lien given by registration of a judgment.

BROWN v. THE CANADIAN PACIFIC RAILWAY CO.

Railway Company—Liability as carriers or warehousemen—Baggage left at station—Pleading—Demurrer.

Held (i) it is the duty of the Railway Company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, till the owner, in the exercise of due diligence, can call and receive it; and it is the passenger's duty to call for and receive it within a reasonable time. If he does not so call for and receive it, it is the Company's duty to put it into their baggage room and keep it for him—being liable only as warehousemen.

(ii) The question whether the consignee of goods carried as freight, or a passenger taking baggage with him, has in a particular case applied for the goods or baggage within a reasonable time after their arrival, is a question of fact to be determined in each case from circumstances.

(iii) Whether it is to be considered ordinarily as a matter of law to be the duty of the passenger by railway train to call for his baggage before leaving the station, and whether in case of his failing to do so or to make any arrangement about it, the Company become merely warehousemen of it, *quære*.

(iv) On the hearing of a demurrer, the Court will look at the whole record and not merely at the particular pleading demurred to; and ordinarily, although such pleading be bad in law, but that to which it is pleaded also be bad, judgment will be given against the party demurring. But when the same pleading which is bad, and is demurred to, is pleaded at once to two former pleadings, one of which is good and the other bad in law, judgment will be given in favour of the party demur-

ring, notwithstanding the defect in his former pleading; for the pleading demurred to being bad in part must be taken as wholly bad.

(v) To an action for losing baggage the Company pleaded as follows:—
“For a tenth plea to the said declaration the defendants say that they did safely carry the said baggage from the said city of Emerson to the city of Winnipeg to their station at the said city of Winnipeg, but the plaintiff left the said railway train and said station without calling for his baggage or taking the same, and that after waiting a reasonable time for the plaintiff to call for and take away his baggage, and the plaintiff not having called within said time for or taken the said baggage, the defendants stored the same in the station baggage room of the defendants, which was a reasonably secure place to put and keep the same, and without any charge to the plaintiff the defendants kept and stored the baggage for the plaintiff; and while the baggage was in the baggage room waiting for the plaintiff to call, the said baggage room, with all its contents, including the baggage, was burned without any default or negligence on the part of the defendants; and the plaintiff did not call for the said baggage until after its destruction by fire as aforesaid, whereby, and for no other cause the said baggage became lost to the plaintiff.”

Held, a good plea.

To the plea, the plaintiff replied as follows:

(vi) “And for a third replication to the eighth, ninth and tenth pleas of the defendants the plaintiff says that on the twenty-third day of February last past, in company with his sister, of whom he had charge, he left Portland, in the State of Maine, as a passenger by rail from that city to the city of Winnipeg, with the baggage in the declaration mentioned; and the plaintiff travelled continuously from the one city to the other; and the plaintiff while at the city of Minneapolis, on the line of route between Portland and Winnipeg, made enquiries from the baggage master of the St. Paul, Minneapolis and Manitoba Railroad, being one of the railways over which the plaintiff was carried in his journey, and the plaintiff was informed by the said baggage master that his said baggage was not being carried on the same train with himself; and the plaintiff when he had completed his journey above mentioned immediately on his arrival at Winnipeg looked in at the door of the baggage car of the train on which he had travelled, for the purpose of finding his said baggage, but did not see the same, although the interior of the car was sufficiently clear to allow him to see if it had been there; and the plaintiff, then looked around the station platform in the immediate vicinity of the baggage car, but could not see his said baggage; and then the plaintiff, relying on the information received from the said baggage master, and on the result of his said search at the Winnipeg station as above described, did not apply to any officer of the defendants for the said baggage, but within a reasonable time thereafter, to wit, on the day following, he made application to the proper officer of the defendants for his said baggage, but the same was wholly destroyed.

Held, bad on demurrer.

TOUSSAINT v. THOMPSON.

Illegal contract—Agreement between one creditor and the debtor to purchase debtor's stock from assignee.

The following declaration, upon demurrer, held not to disclose a contract void for illegality: "For that the plaintiffs had, prior to the month of December, 1882, been carrying on business as general provision merchants at the city of Winnipeg, and in the said month of December the plaintiffs assigned to one William Georgeson, the manager of the defendant's business at the said city of Winnipeg, all the stock-in-trade of the plaintiffs in connection with their said business, for the benefit of all the creditors of the plaintiffs, including the defendants; that the said Georgeson thereupon proceeded to try and procure a purchaser for the said stock and assets, and the plaintiffs were desirous of buying the said stock and assets, and through the assistance of friends intended making an offer for the purchase of the same, as the defendants well knew; and the defendants in furtherance of the plaintiffs desire to purchase the said stock and assets proposed to the plaintiffs that the defendants should purchase the land at as small a figure as possible for the benefit of the plaintiffs, and that the plaintiffs should thereafter enter into possession of the said stock and sell and dispose of the same in the ordinary course of business, and that out of the proceeds thereof the defendants should be paid from time to time the weekly receipts, less the expenses of the plaintiffs, until the amount to be paid by the defendants for the purchase of the said stock and interest thereon, and in addition thereto such a sum as, if added to the amount which the defendants should receive from the said Georgeson as the assignee of the plaintiff as aforesaid, would pay to the defendants the whole amount of the then indebtedness to them, the plaintiffs, should be fully paid; and in consideration that the plaintiffs would not make a bid for the said stock and would exercise their influence to prevent their friends from bidding therefor the defendants promised the plaintiffs that they the defendants would purchase the said stock at as small a figure as possible, and would allow the plaintiffs to enter into possession and sell and dispose of the same until the amount paid by the defendants, together with interest thereon and the further amount aforesaid, should be repaid to them out of the proceeds as above set forth; and that the plaintiffs should be entitled to the balance of said stock or of the proceeds thereof for their own use and benefit. And the plaintiffs did refrain from bidding on the said stock and did exercise their influence to induce their friends to refrain from bidding thereon; in consequence of which and in consequence of its being made known to the other creditors of the plaintiffs that the defendants were in reality purchasers for the benefit of the plaintiffs and in pursuance of the said agreement, the defendants were enabled to and did purchase the said stock at a price very much below its value"—alleging a breach of the agreement.

REGINA v. VROOMAN.

Summary Conviction—Certiorari—Proceeding without summons—Waiver.

A statute provided that there should be no appeal against a conviction.

Held, not to take away the right of *certiorari*.

Unless dispensed with by statute or waived, there must be some previous summons or notice to the party charged, of the hearing of the charge against him.

This may be waived by appearing, pleading, and defending. But asking an adjournment for the purpose of procuring evidence is not necessarily a waiver.

BEEMER v. INKSTER.

Replevin—Writ improperly issued—Action against sheriff.

In an action of trover against a sheriff, the defendant justified under a writ of replevin. Replication, that the writ was "improperly and without any right or authority whatsoever in that behalf sued and prosecuted out of the said Court; and was not to recover goods wrongfully distrained; and that afterwards, to wit: on the twenty-first day of April, 1884, the said matters in the said writ contained having been brought before the said Court for adjudication, Mr. Justice Taylor, then sitting in the said Court for the hearing of causes, determined that the said Court had not jurisdiction to issue the said writ of replevin in the said plea mentioned, and to try the action consequent thereon, and that the said writ was of no force and effect, whatever and was absolutely null and void." Rejoinder, "that the said writ of replevin was good and valid on its face, and appeared to be regularly issued, and was signed by the proper official in that behalf, and the defendant had, at the time he received the same and at the time of the execution thereof, no notice or knowledge that the said writ was issued improperly and without any legal authority, and the said writ has not been set aside nor has any judgment of any kind been entered in the said suit which was commenced by the said writ of replevin."

Demurrer to the rejoinder.

Held, that the rejoinder was good.

If a writ be issued by the proper officer, and from the proper office for such a writ in a proper case to issue from, it is not wholly void, so far as the sheriff who executes it is concerned.

CONWAY v. SCOTT.

Replevin—Action on bond—Original action still pending—Court of Assize.

To an action upon a replevin bond for failure to prosecute "with effect" the defendant pleaded that the original action was still pending and undetermined. Replication "that the suit referred to in the bond mentioned in the declaration herein, was at and before the commencement of this action determined in manner following, that is to say: The said suit was entered for trial at the sittings of Assize and Nisi Prius of this Court in and for the Eastern Judicial District of the Province of Manitoba, beginning on the fourth day of March in the year one thousand eight hundred and eighty-four, and was on the eighteenth day of June in the said year brought on for trial before Mr. Justice Taylor, the learned Judge then holding the said sittings, and the said learned Judge thereupon decided and determined that the said Court had no jurisdiction over the said suit, and struck the said suit out of the list of suits then and there entered for trial at said sittings and declined to give judgment therein."

Demurrer to the replication.

Held, that the replication was bad; there being nothing to show that the suit was determined by the adjudication of the Court before which it was in due course brought, or that such Court, or the Court in which it was commenced, had no jurisdiction to entertain the suit.

The Court of Assize and Nisi Prius is a Court distinct from the Court of Queen's Bench.

SINCLAIR v. MULLIGAN.

Constitutional law—Law in force in Assiniboia—Evidence.

The laws as to the transfer of property prior to the incorporation of this territory with Canada, were the laws which existed in England at the date of the charter of the Hudson's Bay Company—2nd May, 1670—so far as such laws were applicable to the condition of the Country.

The Statute of Uses was in force.

The Statute of Enrolments (27 Hen. VIII, c. 16) was not.

The Statute of Frauds was not in force, not having been passed until after the date of the charter.

A mere verbal bargain and sale of lands, therefore, was sufficient to pass the title both at law and in equity.

Article 53 of the enactments of the Council of Assiniboia of the 11th April, 1862, did not affect the laws of property, but applied only to the regulation of the proceedings of the Court.

An agreement for the transfer of land assumed from the actions of the parties apart from any direct evidence of its existence.

MONKMAN v. ROBINSON.

Examination of Judgment Debtor—Refusal to answer questions—Unsatisfactory answers.

A judgment debtor upon his examination refused to answer questions as to his wife's property.

Held, that his refusal was justifiable.

Held, that, as an examination of a judgment debtor may involve the disclosure of matters in which others are interested, in such case, if the questions are so put as to be directed to the debtor's own connection therewith, they must still be answered; but that the debtor's connection with them must appear before the transactions themselves can be gone into.

To a number of questions, the debtor replied that he did not know or that he had forgotten.

Held, that these answers could not be said to be unsatisfactory, although there was a strong suspicion that they were not altogether truthful.

The questions upon an investigation of this kind must upon their face be relevant to the subject matter of the investigation, and not merely such as may or may not happen to be so. An answer may be quite satisfactory in its relation to the question as being a full and complete answer, and stating what are the facts sought to be discovered, while the statements themselves may disclose an eminently unsatisfactory state of things. It is of the answers in their relation to the questions, and as disclosing what are the facts of which discovery is sought that the statute appears to treat.

DUDLEY v. HENDERSON.

Livery Stable Keepers—Lien for board of horses—Posting up of Act.

In replevin for detention of horses, the defendants avowed "that at and prior to the time of the said detention, they were keeping a boarding-stable in the City of Winnipeg in the Province of Manitoba, and as such had the custody and possession of the said goods and chattels, and that at the time of the said detention the defendants had a lien on the said goods and chattels for money payable by the plaintiff to the defendants for stabling, boarding and caring for the said horses, and the said money being still due and unpaid, the defendants detained the said goods for a lien as security for the said money, which is the alleged detention."

The plaintiff pleaded "that at the time of the said detention the defendants had not conspicuously posted up in the office and in two other places in their said stable a copy of the Act of the Legislature of the Province of Manitoba, passed in the 47th year of Her Majesty's reign, Chapter 15."

Upon demurrer to the plea and exceptions to the avowry.

Held, by Killam, J., that the plea was bad inasmuch as the statutes did not require the copy to be posted up when the goods were detained, but only related to goods or property brought to the hotel while a copy of the act was posted up.

Held, also, that section 9 of the Con. Stat. cap. 56, is not incorporated with the Act 47 Vict. cap. 15, and that therefore the right of a lien did not depend upon the posting up of the Act.

McMASTER v. JASPER.

Interpleader—Application for security for costs—Style of cause.

An application for security for costs of interpleader proceedings, made after the issue of the interpleader order, must be styled, not in the original cause, but in the interpleader issue.

RANKIN v. McKENZIE.

Taxation—Fees in Master's Office—Counsel fees.

In a proper case an appeal from the Master will be allowed upon the quantum of counsel fees.

Two fees of \$100 each reduced to two of \$50 each.

The Master may allow, upon proceedings in his office, one fee of \$20 instead of the usual \$1 or \$2 per hour; but has no power to exceed that amount.

STEWART v. JACKSON.

Costs of former suit—Staying proceedings.

Plaintiff had filed a bill to set aside, on the ground of fraud, a purchase of lands made by him from the defendant. The bill was dismissed because the plaintiff, after his discovery of the fraud, had affirmed the contract. In the present action of damages for the deceit, the defendant applied to stay all proceedings until payment of his costs of the previous suit.

Held, reversing the judgment of Wallbridge, C. J., that as the causes of action were not the same, nor substantially the same, and the plaintiff's conduct was not vexatious, the action should not be stayed.

SUTHERLAND v. McKINNON.

Security for costs—Payment into Court in lieu of a bond—Interlocutory costs.

Money paid into Court in lieu of giving a bond for security for costs will be ordered to be paid out in satisfaction of interlocutory costs.

MANOQUE v. MASON.

Summons to sign Judgment—Set off.

Anything which could have been pleaded by a defendant under the old statutes of set off can now be brought forward in answer to an application for leave to sign judgment under the statute; and will prevent an order being made allowing judgment to be signed.

REGINA v. HOLDEN.

Warrant of Commitment—Defects.

Under 31 and 32 Vict. cap. 30, one Justice may sign a warrant of commitment.

A warrant may be partly written and partly printed.

A warrant was addressed to the keeper of the Common Gaol at the City of Winnipeg, instead of to the keeper of the Common Gaol of the Eastern Judicial District.

Held, sufficient.

The commitment stated the offence as follows:—"On or about the fourth day of May, 1886, did embezzle the sum of \$104, being the property of the Dominion Express Company."

Held, insufficient.

The crime of embezzlement is purely statutory, and can be committed by certain persons only. It is not sufficient to charge "embezzlement" merely by its name. As in perjury it must be shown that the oath was taken in judicial proceedings, so in embezzlement the relationship of the accused to the person despoiled must appear.

THE EASTERN JUDICIAL DISTRICT BOARD v. THE CITY OF WINNIPEG.

Judicial District Boards—Separation of Winnipeg from Selkirk—Winnipeg's liability to board—Equalized assessment—Judicial notice—Pleading—By-laws not under seal—Action for debt under statute.

The Charter of the City of Winnipeg, 47 Vict. cap. 78, separates the city from the county of Selkirk, but in a qualified manner only, and may be liable to the Eastern Judicial District Board for debts and liabilities due by the City at the date of the Act.

The Court will take judicial notice of the territorial divisions of the Province.

An allegation that a by-law was *passed* is a sufficient allegation that it was sealed, if sealing be necessary.

By-laws of the Board, except those under which debentures are to be issued, need not be under seal. Where an Act of Parliament casts upon a party an obligation to pay a specific sum of money, to particular persons, an action of debt may be maintained for the amount; and that although a different remedy may be provided by the Act. A mandamus would not be granted.

The Judicial Districts, in apportioning among the municipalities the amounts necessary to be raised, have a discretion as to whether the equalized assessment shall be of the real and personal estate, or of the real estate alone.

An allegation that the amount was "on the basis of the equalized assessment and valuation of the real property, duly appointed and directed to be borne," is a sufficient allegation that the Board did exercise the discretion vested in it.

FERGUSON v. CHAMBRE.

Examination of judgment debtor—Debt secured—Order refused.

Whether an order will be made for the examination of a judgment debtor, is discretionary with the Judge applied to.

The debt being amply secured, an order was refused, and upon appeal this refusal was upheld.

Per Dubuc, J. When a Judge has a discretion to exercise and has exercised it, his order should not be rescinded, unless it is found to be manifestly erroneous, through misconception of some facts or of some principle of law.

THE CANADIAN LAW TIMES.

VOL. VI.

NOVEMBER, 1886.

No. 18.

VICE-ADMIRALTY JURISDICTION: DAMAGE.

DAMAGE to *Property*.—This branch of Vice-Admiralty Jurisdiction may be conveniently sub-divided into (1) *Damage to Ships*; and (2) *Damage to Property other than Ships*.

(1) *Damage to Ships*.—In the case of *The Woodrop—Sims* (a), decided in 1815, Sir W. Scott in a much-quoted judgment thus describes the various classes of collisions between ships:—"There are four possibilities under which an accident of this sort may occur:—

It may happen without blame being imputable to either party; as when the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.

Secondly, a misfortune of this kind may arise, where both parties are to blame, when there has been a want of due diligence or skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them.

Thirdly, it may happen by the fault of the suffering party only; and then the rule is that the sufferer must bear his own burden.

(a) 2 Dod. 83.

Lastly, it may have been the fault of the ship which ran the other down ; and in this case the injured party would be entitled to an entire compensation from the other " (b).

In the first class of cases the collision is the result of inevitable accident. The English and American authorities illustrating this class are reviewed in Marsden on Collisions, p. 21 *et seq.* (c).

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases and has been found by long experience to be sufficient to answer the end in view, the safety of life and property (d). Where both vessels are to blame, each vessel is entitled to recover a moiety of her damage from the other (Marsden, p. 2). Where both vessels are injured and cross-causes are instituted, although judgment is pronounced in each case for a moiety of the damage proceeded for, execution is allowed to issue for the balance only due to the owners of the ship which has received the greater injury, that balance being a moiety of her damage less a moiety of the damage to the other ship (e). To enable this manifestly just result to be attained, it is provided by the Admiralty Court Act 1861 (f), that the Court may direct the principal cause and cross-cause to be heard at the same time and on the same evidence ; and if in the principal cause the defendant's ship has been arrested or security given by him to answer judgment, and in the cross-cause the ship of the plaintiff in the principal cause cannot be arrested, and security has not been given, the

(b) See also the following cases decided by the Supreme Court of the United States ; *Strout v. Foster*, 1 How. 89 ; *The China*, 7 Wall. 53 ; *The Sunnyside*, 91 U. S. 208.

(c) See also Maclachlan, p. 292 ; *The Margaret*, 2 Stuart 19 ; *The McLeod*, 2 Stuart 140 ; *The Agamemnon*, Cook 60 ; *The Frank*, Cook 81 ; *The Ida*, Cook 275.

(d) *The Grace Girdler*, decided by the Supreme Court of the United States in 1869, 7 Wall. 196.

(e) *The Hector*, L. R. 8 P. D. 223.

(f) 24 Vict. cap. 10, sec. 34.

Court may stay proceedings in the principal cause until security has been given in the cross-cause. A similar provision is contained in the Vice-Admiralty Courts Act 1863 (g). The practice and procedure of the High Court of Admiralty in such cases are much considered and discussed by the Court of Appeal in *Chapman v. The Royal Netherlands Steam Navigation Company* (h); and by the House of Lords in *The Stoomvaart Maatschappij Nederland v. The P. & O. Steam Navigation Company* (i). The rule of equal division of damage where both vessels are to blame, although not derived from the Civil Law is undoubtedly of great antiquity (j). It is retained and extended by the Supreme Court of Judicature Act 1873 (k), which enacts that "in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." A similar provision has been introduced into Canada by the Dominion Parliament (l). It is as follows:—"Provided always that in any cause or proceeding for damages arising out of a collision between two vessels, or a vessel and a raft, if both vessels or both the vessel and the raft are found to have been in fault, the rules heretofore in force in the Court of Admiralty in England, and now in 'Her Majesty's High Court of Justice' under the 'Supreme Court of Judicature Act, 1873,' so far as they

(g) 26-7 Vict. cap. 24, sec. 21; see also Vice-Admiralty Rules 1884, Nos. 27, 28, printed in App. to Cook's Ad. Cas. p. 384; and G. O. of Mar. Court of Ont. 266.

(h) L. R. 4 P. D. 157.

(i) L. R. 7 App. Cas. 795. See also, *The Lord Melville*, 1 Shaw Sc. App. 402; *The Petersfield and Judith Randolph*, cited in *Hay v. Le Neve*, 2 Shaw Sc. App. 404, and reported in Marsden's Ad. Cas. p. 332; *De Vaux v. Salvador*, L. R. 4 A. & E. 431; *The Washington* and *The Catharine*, 5 Jur. 1067; *The Seringapatam*, 3 W. Rob. 38, 44; *The Tecla Carmen*, Lush. 79.

(j) See cases reported in Marsden's Ad. Cas. The origin and history of the rule and the reason upon which it is based are traced and discussed in Maclachlan on Shipping, p. 287 *et seq.*, Marsden on Collisions, p. 49, *et seq.*, and in a note at p. 295 of Cook's Ad. Cas.

(k) 36 & 37 Vict. cap. 66, sec. 25 (g) Imp.

(l) 43 Vict. cap. 29, sec. 8.

are at variance with the rules in force in the Courts of Common Law, shall prevail, and the damages shall be borne equally by the two vessels, or the vessel and the raft, one half by each."

Where one of the vessels is relieved from responsibility by reason of the blame imputed to her being the fault of a pilot on board by compulsion of law, the owner of that vessel is entitled to recover a moiety of her damage only, but without any deduction on account of the damage sustained by the other. This illogical application of the rule seems firmly established (*m*). The rule is also applied in cases where the cargo of either vessel is injured in the collision, so as to prevent the cargo-owner recovering more than one half of the damage to his cargo from either vessel (*n*). This of course does not affect the rights of the cargo-owner against the carrying vessel under the contract of affreightment (*o*). No doubt the rule would be similarly applied in respect of the claim of a passenger on board one of the colliding vessels, for injury to his person or property (*p*).

The jurisdiction of the High Court of Admiralty extends to cases where damage is done to a ship although there is no collision with the delinquent vessel, or between two or more vessels. Where the misconduct or careless navigation of one vessel rendered it necessary for another to execute a manœuvre which resulted in the latter being driven against a wall and injured, the former vessel was held responsible for the damage (*q*). And where one ship was by the improper navigation of a second ship compelled to alter her course, and so did damage to a third ship, the ship which compelled her to alter her course was held liable for the

(*m*) *The Hector*, L. R. 8 P. D. 218.

(*n*) *The Milan*, Lush. 404; *The City of Manchester*, L. R. 5 P. D. 221; *The Eliza Keith*, Cook 107; *Chartered Bank of India v. Netherlands India St. Nav. Co.*, L. R. 9 Q. B. D. 118; 10 Q. B. D. 521; *Chapman v. The Royal Netherlands St. Nav. Co.*, L. R. 4 P. D. 157; *The Demetrius*, L. R. 3 A. & E. 523.

(*o*) *The Bushire*, 52 L. T. 740.

(*p*) *The Cumterland*, 5 L. T. N. S. 496; *The Explorer*, L. R. 3 A. & E. 289; *The Bowdoin*, 5 L. T. N. S. 291.

(*q*) *The Industrie*, L. R. 3 A. & E. 303.

damage to the third ship (*r*). These decisions appear not to have rested upon the provisions of the statute (*s*) which expressly gives jurisdiction to the High Court over claims for damage *received by any ship*, a provision which does not occur in the Vice-Admiralty Court Acts (*t*), but rather on the view that damage caused by the negligent management of a ship is damage *done by* that ship. Whether the provision referred to confers any jurisdiction which is not included in the phrase *damage done by any ship* is not clear. The Privy Council held in *The Malvina* (*u*), that it was the intention of the Legislature to be gathered from the words of the later Statute (*v*), which speaks only of damage *done by* any ship, to give the utmost extent of jurisdiction in cases of collision. *The Robert Pow* (*w*), a case in which it was held that *damage* in the statutes, means damage by collision only, though approved of in *The Energy* (*x*), is not in harmony with the later decisions above cited, and seems to be expressly overruled in *The Industrie* (*y*), where it is said by Sir Robert Phillimore that though there has been some fluctuation in the decisions it is now established that the High Court has jurisdiction where damage has been done or received by a ship although there may not have been a collision between two or more ships. See also *The Batavier*, decided in 1854 (*z*), where a steamer which proceeded so swiftly up a river as to cause a swell whereby a barge laden with coal was sunk, was held liable for the damage; but the jurisdiction does not seem to have been disputed.

(*r*) *The Sisters*, L. R. 1 P. D. 117; see also *The Wheatsheaf* and *The Intrepide*, 2 Mar. Law Cas. O. S. 292; *The Energy*, L. R. 3 A. & E. 48; *The William*, Cook, 171.

(*s*) 3 & 4 Vict. cap. 65, sec. 6.

(*t*) See *ante*, p. 459.

(*u*) Br. & L. 57.

(*v*) 24 Vict. cap 10, sec. 7.

(*w*) Br. & L. 99.

(*x*) L. R. 3 A. & E. 48.

(*y*) L. R. 3 A. & E. 307.

(*z*) 1 Spinks E. & A. 378; 9 Moo. P. C. C. 236.

2. Damage to *property other than ships*.

The jurisdiction extends to cases of damage to property other than ships. In 1867, Dr. Lushington held a vessel liable for injury done by it to a breakwater (a); and the case is referred to in *Smith v. Brown* (b) as being clearly within the words of the statute. The Vice-Admiralty Court of Nova Scotia, in like manner awarded damages for injury to a wharf against which a vessel which had been insufficiently moored was driven in a gale (c). And the Vice-Admiralty Court of Quebec also held a vessel liable for negligently breaking a sub-marine telegraph cable (d), following a similar decision of the High Court of Admiralty (e). The jurisdiction was, by the Maritime Court of Ontario, held to extend to a case of damage to a farm adjacent to the Welland Canal, which was flooded by water from the Canal owing to the negligent breaking of lock-gates by a vessel (f). Where, however, a claim was made by the lessee of a wharf for consequential damages to his business resulting from the wharf being injured by a vessel, it was held that the Court had no jurisdiction (g).

Note on Regulations for preventing Collisions on Canadian Waters :—The first general Canadian Act on this subject was 22 Vict. cap. 19, passed by the Legislature of the then Province of Canada in 1859, which repealed several prior Acts. This statute appears as chapter 44 of the Consolidated Statutes of Canada. In 1864 the last mentioned Act was repealed by 27-28 Vict. cap. 13, which recited that "it will tend to the greater security of life and property in

(a) *The Uhla*, L. R. 2 A. & E. 29, note 1.

(b) L. R. 6 Q. B. 729.

(c) *The Chase*, Young's Ad. Dec. 113; 2 Stuart 361.

(d) *The Czar*, Cook 9.

(e) *The Clara Killam*, L. R. 3 A. & E. 161.

(f) *The Walter S. Frost*, 5 C. L. T. 471.

(g) *The Barcelona*, Cook 311.

vessels navigating Canadian waters, that the same rules of navigation and the same precautions for avoiding collisions and other accidents, as are now adopted in the United Kingdom and other countries, should be also adopted in Canada ;” and proceeded to introduce the Imperial rules then in force, and the provisions regulating liability in collision. In 1868, the Parliament of Canada repealed all statutes on this subject then in force in the provinces of the Dominion, and re-enacted the provisions of the Statute of the Province of Canada of 1864, making them applicable to the whole Dominion (*h*). This Act among other things repeated the provision contained in prior Acts, that where a collision was occasioned by non-observance of the rules prescribed by the Act, the vessel infringing the rules should be deemed to be in fault, and its owner should “*not be entitled to recover any recompense whatever for any damage sustained by such vessel in such collision.*” The effect of this was to prevent a vessel, *where both were to blame* for infringement of the rules, recovering any damages whatever from the other. See *The Rosa* (*i*) ; *The Eliza Keith* (*j*). The section was a repetition of section 298 of the Merchant Shipping Act of 1854, which was altered by 25 & 26 Vict. cap. 63, so as to revive the former Admiralty rule as to division of damage in such cases. In 1880, the rules which were adopted in England by Order in Council of 14th August, 1879, were introduced into Canada (*k*) ; and the provision referred to was also altered in like manner (*l*).

In 1881, an Act was passed by the Dominion Parliament (*m*), whereby, in the event of the Imperial regulations of 1879 being annulled or modified, or new regulations added or substituted, the Governor-in-Council was empowered to make corresponding changes as respects Canadian waters.

(*h*) 31 Vict. cap. 58, (D).

(*i*) Cook 104.

(*j*) Cook 113.

(*k*) 43 Vict. cap. 29 (D).

(*l*) *The Lombard*, Cook 294.

(*m*) 44 Vict. cap. 20.

On the 11th of August, 1884, new Imperial regulations were substituted for those of 1879. They are printed at p. xxx of the Dominion Statutes for 1884-5. These regulations have not been adopted in Canada, and those of 1879 are still in force on Canadian waters.

R. GREGORY COX.

ST. CATHARINES.

EDITORIAL REVIEW.

Interest Post Diem.

The case of *Peck v. Powell*, which we have reported in full in this number has caused a reconstruction of mortgage covenants and provisos for repayment, and a general revision of securities by investors.

The opinion has freely been expressed that where interest at the contract rate has been paid on overdue mortgages, the mortgagees will be entitled to recover the same rate *in futuro* on the ground of implied contract. That, however, is at least doubtful if not a settled point by the decision in *Re Roberts*, L. R. 14 Ch. D. 48, in which case a mortgagor covenanted to pay ten per cent. per annum. He paid interest at that rate for several years after maturity of the mortgage and then died. On administration of his estate the mortgagee proved as a creditor, and it was held that he was entitled to recover four per cent. only. The Court of Appeal expressly put the right to recover any interest at all upon the ground that the mortgagee was entitled to recover it as damages for detention of the debt. Jessel, M. R., said, "The agreement was to pay 10 per cent. up to a certain day, and then to pay £5,000, and the only point we have to decide is, what is the proper amount of damages for the nonpayment of that debt."

Peck v. Powell is a case differing from the cases cited in it, and the difference is noted in the concluding part though without altering the decision. We venture to think that in the case of redemption of a mortgage a difficult rule should prevail. In *Re Roberts*, Cotton, L. J., concurring with Jessel, M. R., says, "I am of the same opinion; and it is only necessary for me to add that we are not deciding now what rate of interest should be allowed in a suit for redemption, but simply on an action brought for breach of

covenant to pay the money on a given day." *St. John v. Rykert*, 10 S. C. R. 278, was a suit by a judgment creditor to set aside a fraudulent conveyance, in which the plaintiff claimed to add to his judgment interest at the contract rate of 24 per cent. *Re European Central R. W. Co.*, L. R. 4 Ch. D. 33, was a case of a judgment on a debenture in which the original debt was merged in the judgment which carried interest at four per cent. only.

The Court, however, in mortgage cases proceeds upon a different principle entirely. The right of a mortgagor to redeem is so elementary a principle that it is unnecessary to enlarge upon the reason for its existence. In such cases the Court is not in general awarding damages for detention of the debt, but is adjudging the mortgagee to be the legal owner of the land mortgaged, subject only to the mortgagor's equitable privilege of redemption. This privilege may be granted upon such terms as a Court of Equity thinks fit to impose. The application of the principle has been productive of some enormities in the doctrine of consolidation of securities, beside which the payment of the contract rate of interest in many cases would sink into insignificance. None of the cases we have mentioned, nor yet *Cook v. Fowler*, L. R. 7 H. L. 27, bind the Court to apply the same rule in cases of redemption as is observed in an action on a covenant; and the dictum of Lord Justice Codon in *Re Roberts* would seem to indicate that the same rule should not be applied.

It is denied in *Cook v. Fowler*, that a contract for a specific rate up to maturity furnishes any ground for implying a contract to pay the same rate after maturity; but Lord Selborne thought that where the contract rate was reasonable, and not as in that case excessive and extraordinary, it might well be adopted by a Court or jury as a proper measure of damages for the subsequent delay. The difficulty of applying this rule, which is after all a rule of evidence, shifting the *onus probandi*, are pointed out, *ante* Vol. I. p. 296. But it furnishes an equitable rule which may well be applied in cases of redemption, that if the rate be reasonable and ordinary the mortgagor should be put

on terms of paying the contract rate as one of the conditions of being allowed to redeem.

In *Simonton v. Graham*, 1 C. L. T. 339, the report was referred back to the Master with a direction to allow the rate fixed by the contract unless the mortgagor could show that the current rate was less. That ruling is open to the criticism that there was no liberty to the mortgagee to show that it was more; and indeed in *Re Roberts*, Jessel, M. R., hints that the rule will only work in one way. And the liberty to the mortgagor to show the current rate is also impregnated with the notion of allowing interest to the mortgagee as damages—interest as damages being allowed at the current rate.

The matter is of importance to mortgagees who may be obliged to call in their money before the day named for payment of the principal by reason of the default made by the mortgagor before maturity. Although the mortgage is in such cases deemed to have matured, yet the mortgagee is deprived of the rate which he stipulated for during the very time the contract was to run; and there is a still greater equity in such cases to impose upon the mortgagor the terms of paying the contract rate if he seeks to redeem.

The Sittings of the Courts.

We referred to the single Courts, or rather no court, grievance while the spring circuits were going on, ante p. 234. Now that the autumn circuits are proceeding we have again to recur to it.

We must do the justice to Chief Justice Wilson to say that his efforts have been unceasing this autumn in endeavouring to keep down the single court work. But a new arrangement must be made, and that at once. There is a great waste of energy on the Bench. Two Judges go to a circuit town to try cases that one might dispose of, while no one does the work that ought to be done in Toronto. Two Judges are supposed to sit at Osgoode Hall during the week to dispose of work that ought to be disposed of by one. When one does not sit the other cannot do his work.

The consequence is that while the assizes and sittings are rushed through by forced sittings and incessant work, the important weekly Court sittings at Osgoode Hall drag on in a desultory and uncertain way without performing their functions. We must always except the Chancery Division Judges who hold the weekly court and chambers with the greatest regularity.

We stated before that if a remedy is not proposed and put into operation by a rule of Court, a change will be made by the Legislature. Now that the circuits are nearly over the question which is being agitated should receive prompt and practical consideration. The profession are a unit upon this, that something must be done, and we believe the Judges are quite alive to the same fact. A meeting of the Judges and the leaders of the Bar might well be arranged for, at a short date, at which a new scheme might be proposed and discussed. To avoid delay and to prevent the possibility of an unproductive discussion at such a meeting, we would propose that the Judges of the Court of Appeal should meet those Judges of the High Court who are in Toronto for the time, and adopt some definite principle upon which they would be willing to act. This being communicated to the Bar, the latter might easily be prepared with modifications or acceptance of the principle; and at a meeting of both, there would be a subject for discussion, limited by practical bounds, upon which immediate action could be taken.

We advocate now what we have advocated before, the entire abolition of all distinction between the divisions. Theoretically that is done now. The principle has been admitted that a chamber appeal in the Chancery Division may be heard before a Judge of a Common Law Division; and we have a rule of court which permits notice of trial to be given for either the Chancery Division Sittings or the Assizes. All distinction in jurisdiction is abolished, and it only remains to complete the work by abolishing the separate sittings for trials, and those of the weekly Courts. This is perhaps as far as the Judges can go. The abolition of the names of the Divisions, and in fact of the Divisions

themselves, may be, and we think is desirable, but that must be done by the Legislature. If the weekly sittings of the Court and Judges' Chambers are arranged for at once without distinction by reason of the Divisions, it will afford great relief, and the question of remodelling the Courts might be left for more deliberate consideration.

A Law List.

We have received a communication from Mr. H. W. C. Meyer, in which he proposes the publication by the Law Society of an official Law List for sale to the public and gratuitous distribution to the profession.

There is already published a very good law list compiled by Mr. Hardy in the shape of a chart, which shows at a glance all practising solicitors in Ontario with their Toronto agents. As long as private enterprise supplies the want of the profession in this respect we are averse to the work being done for the profession gratuitously. It is true that Mr. Hardy's chart is not official, nor is it perfect, but in course of time it will be improved. There is required in order to make it complete, an alphabetical list of Barristers and Solicitors, with references to the Towns in which they practise. Further than this however the chart cannot be expected to go.

As to the remaining portion of the communication, we quite agree with our correspondent, that there should be an official list of those members of the profession who are in good standing, which should be open to inspection by all members of the profession. There are of course the Barristers' and Solicitors' Rolls, but they do not show what the profession have a right to know, namely, who are at present practising and entitled to practise. To meet this want an official list might be made up by the Secretary at the close of every year of all those who have paid their fees, and might be exposed in the Library for inspection. Such a list has to be prepared every year for the purpose of ascertaining who are entitled to receive the reports and the cost of printing it when compiled would be very small.

Imperial Federation.

We have received a pamphlet on Imperial Federation by Mr. H. Percy Blanchard, of Nova Scotia, in which a scheme for the consolidation of the Empire is propounded, and a constitution actually drafted. But as the constitution bears a striking literal resemblance to the British North America Act, all Canadians will without further advice be able at once to comprehend the whole scheme.

BOOK REVIEW.

Tact in Court containing sketches of cases won by skill, wit, art, tact, courage and eloquence, with practical illustrations in letters of lawyers giving their best rules for winning cases. Third revised edition. By J. W. DONOVAN, author of "Modern Jury Trials," "Trial Practice and Trial Lawyers." Rochester: Williamson & Higbie, 1886.

If we thought that any person ever acquired tact who was not by nature a tactician, we would recommend the perusal of such books as might serve to instruct in the tactician's art.

If we thought that men could win cases by wit, art and tact, setting aside the very right and justice of the case, we would hesitate to recommend any book that would enable them to do so.

Professional skill may be acquired from the perusal of law books combined with experience, but not from the perusal of a book of recipes. So we cannot recommend the book on that account.

Courage and eloquence must be born in a man.

We have patiently looked through this book and cannot see in any place that proper emphasis is laid upon the fact that Counsel's duty is to assist the Court in doing justice, and not to win at all hazards.

REVIEW OF EXCHANGES.

Central Law Journal.—1st January, 1886.

Situs of Personal Property for Taxation, by CROSBY JOHNSON. When the situs of tangible personal property coincides with its owner's domicile it is subject to taxation there unless exempt by the law of that locality. Goods in transit are not taxable until they reach market or are in such condition as to form part of the wealth of the community owing to tax them. The law as to incorporeal property is treated of at length.

Central Law Journal.—1st January, 1886.

Every Man's House his Castle, by J. P. KIRLIN. A short résumé of the maxim embodied in the maxim.

Some Points Pled in Telephone Law, by WM. G. WHIPPLE. Telephone companies possess the right of eminent domain. Poles in a city should be shapely and not unsightly; so held in Missouri. As to stringing wires across streets, in England it has been held that as a city does not own to the skies it cannot prevent by injunction such a disposition of the wires when adjoining owners consent and no nuisance is committed. An operator who received a message from A. and transmitted it to B., having forgotten the message, it was held that A. might prove by himself and bystanding witnesses the message he had sent. Telephone companies must serve the public without distinction, and cannot discriminate.

Ibid.—15th January, 1886.

Sleeping Cars, by K. K. KNAPP. Sleeping car companies are not carriers, nor are they innkeepers. "When the company invites the person to sleep, it is only fair to hold that it engages to give that without which no one could safely accept the invitation, or protection, and so the Courts have held. Not that it becomes an insurer, as we have seen, but it assumes the duty of exercising ordinary and reasonable care that the passenger shall not suffer loss." The protection is extended only to such property as a passenger might reasonably be expected to take into a car with him.

Ibid.—22nd January, 1886.

The Account Stated, by FRANK C. HADDOCK. As merchants deal with accounts daily and other classes but occasionally, the old doctrine was that an account held without objection by a merchant became stated by acquiescence. Modern authority supports a wider application.

Ibid.—29th January, 1886.

Verdicts in Civil Cases, their form and substance, by CROSBY JOHNSON. Many American cases are cited.

Ibid.—5th February, 1886.

Remedy by Execution—Fraudulent Conveyances, by GIDEON D. BANTZ. Cites American cases.

Real Estate Brokers, their right to Commission, by H. CAMPBELL BLACK. It is not always necessary to entitle a real estate broker to recover commission, that an actual sale should have resulted from his efforts to dispose of his principal's property. When he produces a purchaser he has done all that he can. The broker must show that he was employed, or that the fact of employment is a necessary implication of law from the recognition and acceptance of his services by the principal. When the principal employs several brokers, each with limited authority, a sale by one revokes the authority of all the others.

Ibid.—12th February, 1886.

Municipal and quasi-Municipal Contracts. ANONYMOUS. Many American cases are cited.

Vendor and Purchaser—Damages for nonfulfilment of Contract, by GEO. W. WARVELLE. English and American cases are cited.

Ibid.—19th February, 1886.

Proof required of proponent, or writer of a will, by JOHN F. BURKE. It is laid down that a proponent who is writer and chief beneficiary of a will must remove the suspicion cast upon him by competent, sufficient, and satisfactory evidence. Numerous cases are cited.

Right of set off as against holder of a note endorsed to him after maturity, by G. W. W. THORNTON. English and American cases cited.

Ibid.—26th February, 1886.

Fence Law, by CROSBY JOHNSON. At Common Law there was no obligation on an owner to fence his land, but he was bound to confine his cattle to his own land.

Various statutory enactments are dealt with, and many cases cited.

Ibid.—5th March, 1886.

Names of persons, by W. W. THORNTON. Concluded in the following number. Originally a man could have but one lawful christian name. Now, usage sanctions more than one. A man may take whatever surname or as many surnames as he pleases, without the aid of a statute, unless prohibited by some statute. The father, even to the exclusion of its

mother, has the right to name his child. If the father die before the child is named the right devolves upon the mother, and a guardian would probably have the right, the father and mother being dead. A divorce does not give back to a woman her maiden name; she retains that of her husband. A marriage under a false or fictitious name does not render the marriage void or voidable unless when done for the purpose of committing a fraud. Many cases are cited on the effect of suing by particular designation, identity, etc.

Ibid.—19th March, 1886.

Risks attending the purchase of certificates of Stock, by ISAAC H. LIONBERGER. The purchaser gets no better title than his vendor has at the time of the sale. When the charter or by-law of a corporation requires transfers of stock to be made on its books, a purchaser who neglects to comply with the requirements subordinates his rights to the rights of others attaching after the sale but before registration.

Evidence of Interest, by W. F. ELLIOTT. A number of American cases are cited.

Ibid.—2nd April, 1886.

Powers of Municipal Corporations, by D. H. PINGREY. English and American cases are cited.

Ibid.—9th April, 1886.

The right to inspect Public Records, by W. B. MARTINDALE. The article is restricted to the right to inspect and copy documents affecting titles to real estate.

Ibid.—16th April, 1886.

Powers of Bank Directors, by J. L. K. MICHILLS. Directors generally have power to do all things coming within the range of the bank's business, or which the company could do, unless restrained by its fundamental law or by-law, but beyond such limits they cannot go and bind the bank, even though they may have so formerly acted in similar transactions. American cases are cited.

Ibid.—23rd April, 1886.

Tender, by M. W. HOPKINS. Tender is defined. The effect is then discussed. The refusal must be certain and absolute. A tender must be kept good after action by payment into Court.

Ibid.—30th April, 1886.

Release of Property held as Surety, by ADELBERT HAMILTON. Property may be placed in the same relation as a surety, without any personal responsibility as surety being imposed upon or assumed by its owner; and when so pledged or mortgaged to secure the debt, default or miscarriage of another, such property becomes a surety or guaranty, and any act which would discharge a personal surety or guarantor, will release the property.

Ibid.—7th May, 1886.

Bona fide Holder of Negotiable Paper—What is Bad Faith, by WM. M. ROCKEL. There are exceptions to the ordinary rule that whoever becomes the holder of negotiable paper in good faith before it is due, for value, without notice of facts which impeach its validity takes a good title; as where the note is given for an article forbidden by statute, or for an illegal or immoral purpose, or where the maker, without negligence, is tricked into signing a paper which he did not intend to be a note, where the note has been altered or forged, or procured by fraud or duress, or where the maker is incapable of contracting. The various kinds of notice are discussed.

Ibid.—14th May, 1886.

Purchasing Mortgaged Real Estate, by CHARLES BURKE ELLIOTT. A conveyance subject to a mortgage, but without an express stipulation that the grantee shall pay the debt, leaves the grantor primarily liable for any deficiency there may be after the sale of the property. The difference between buying subject to a mortgage and assuming payment of the debt is that in one case the purchaser becomes personally liable and not in the other. American cases are cited.

Contempt of Court, by E. S. WHITTEMORE. English and American cases cited.

Ibid.—21st May, 1886.

Administration of the Estates of Living Persons, by J. M. VANFLEET. The Supreme Courts of Pennsylvania, Illinois, Tennessee, Wisconsin, South Carolina, California, and the United States Circuit Court for Southern New York have held that letters so issued are void, and that a sale of property thereunder passes no title to a *bona fide* purchaser. The New York Court of Appeals holds such letters to be valid, and all acts done under them before revocation to be valid. The learned writer undertakes to show that the New York Court is right.

The use of Christian Names in Legal Proceedings, by H. CAMPBELL BLACK. American cases are cited.

Ibid.—28th May, 1886.

Declarations of pain and suffering, by W. H. RUSSELL. The learned writer draws the following conclusions from a review of the authorities:—*Post litem motam* declarations of present pain are not admissible in behalf of the declarant when made either to a non-expert, or to a non-attending physician examining simply to make medical testimony, or to determine the condition of the party. Exclamations of pain and movements indicating pain may be described by any witnesses who hear and see them. It is doubtful whether declarations of present pain made *post litem motam*, even to an attending physician, should be admitted. Declarations as distinguished from exclamations, groans, movements, and the natural expressions of pain, should never be

admitted when made *post litem motam* to a non-expert. The learned writer then submits that non-experts should never be allowed to detail declarations and statements of past or present pain, and that attending physicians should only be allowed to describe and repeat complaints, exclamations, expressions, or movements made by their patients and indicating, apart from the words used, the present existence of pain.

Ibid.—4th June, 1886.

Election of remedies, by W. W. THORNTON. Concluded in the following number. The right to elect between remedies existed at common law. "The codes adopted by many of the states sought to sweep away all distinctions between causes of action, and substitute a plain statement of facts, and allow the Court to grant whatever relief was necessary to secure the plaintiff or defendant in his right. In the states that have adopted these codes, therefore, it would necessarily and logically follow, if the spirit of this legislation were followed out to its legitimate conclusion, that a right of election would no longer exist, because, upon a recital of the facts, the Court would grant him whatever relief he is entitled to receive. But the Courts have disregarded this distinction, and have followed the old cases, and the distinctions they drew; and they are therefore authorities under the modern codes."

Ibid.—18th June, 1886.

Rules of practice on the taking of depositions, by H. CAMPBELL BLACK. The taking of depositions by commission is regulated by the law of the country whence the commission issued, and the commissioner is an officer of the state under whose authority he is appointed. He cannot delegate his duties which are personal, and is disqualified by interest or relationship. Other rules are discussed and illustrated.

Ibid.—2nd July, 1886.

Share of Stock—Creditors and Assignees of Certificates, by ISAAC H. LIONBERGER. "We think the conclusion inevitable, that shares of stock must, like other personal property, be delivered at the time of sale or within a reasonable time thereafter, and that a transfer on the books, in conformity with the rules of the Company, is the mode of delivery best calculated to defeat the evils which delivery was designed to preclude. Delivery of the certificate will not answer the purpose."

Delivery of Deeds, by JAS. P. OLIVER. English and American authorities are cited.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 6TH JANUARY, 1885.]

WILSON v. ROBERTS.

Libel—Costs—Nominal damages—Rule 428.

Where in an action of libel a verdict for \$1 damages was found, and the judge at the trial gave no certificate for costs,

Held, that the Statute 21 Jac. I, cap. 16, was, as to costs in actions of libel, etc., repealed by Rule 428, and that the plaintiff was entitled to tax full costs.

Garnett v. Bradley, L. R. 3 App. Cas. 944, *held* to apply to actions of libel as well as slander, and followed.

H. J. Scott, Q.C., for the defendant.

Aylesworth, for the plaintiff.

REGINA v. McDONALD.

[WILSON, C.J.]

Conviction—Malicious injury to property—Reasonable supposition of right.

S. owned lot 38 in the eighth concession of N. township, containing two hundred acres. In 1866, he sold the west half of the lot to the complainant, reserving a strip thirty feet in width along the north line thereof, as a road for himself and his successors in title, to and from the highway at the west of lot 38, and to and from the east half of the lot. S. put up a gate at the west limit of the land, where it met the highway, which gate had been there from 1866 until removed by the defendant.

The defendants were successors in title to S., and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road as the property of the complainant.

Held, that the defendants were acting in good faith in claiming the right to remove the gate, and under a fair and reasonable supposition of right to do so; and therefore the conviction was quashed.

Held, also, following *Regina v. Malcolm*, 2 O. R. 511, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the Justice, and his decision upon a matter of fact would not be reviewed, but that this rule did not apply where all the facts showed that the matter or charge itself was one in which such reasonable supposition existed, that is, where the case and the evidence were all one way.

Quære, whether a gate across a right of way is an obstruction in law

Held, also, that the proviso in section 60 of 32 and 33 Vict. cap. 22, is to be read as applicable to section 29, and to the whole Act.

Kappele, for the motion.

Aylesworth, contra.

REGINA v. LYNCH.

Conviction—Retrospective operation of 49 Vict. cap. 49 (D) — Excess of jurisdiction.

Held, that, notwithstanding it is not so expressly enacted, the statute 49 Vict. cap. 49 (D) has a retrospective operation upon cases decided prior to the passing of the Act.

Held, also, that under the seventh section of that Act, the right to *certiorari* is taken away upon service of notice of appeal to the sessions, that being the first proceeding on an appeal from the conviction.

The conviction was held bad in that where imprisonment is directed for non-payment of a penalty, the adjudging of a distress of the goods to levy it, and then imprisonment in case the distress proves insufficient, is invalid in law and an excess of jurisdiction.

T. W. Howard, for the application.

Clement, contra.

REGINA v. HODGINS.

The Canada Temperance Act, 1878—Disqualification of convicting Magistrate —R. S. O. cap. 71, s. 7—Variance between the information and conviction —Amendment.

The court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting Justices had not the necessary property qualification, the defendant not having negatived the

Justice's being a person within the terms of the exception or proviso of R. S. O. sec. 7, cap. 71.

Held, also, that it was no variance between the information and conviction that the former used the expression "disposal" and the latter "sale," and that, if there had been, an amendment would have been made under secs. 116, 117 and 118 of the first mentioned Act.

Clement, for the motion.

McLaren, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 26TH JUNE, 1886.]

MACGREGOR v. McDONALD.

Discovery—Fraud—Subsequent dealings with estate—Examination—Production—Privilege—Solicitor.

In this action the plaintiff in her statement of claim charged her brother, the defendant D. M. McD. with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife; and prayed to have the will set aside. D. M. McD. in his examination for discovery before the trial admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it.

Held, that, although what took place after the father's death was no proof of the fraudulent design, yet it might throw light upon it, and the plaintiff was entitled to interrogate D. M. McD., upon his examination before the trial, as to whether he had invested the moneys of the estate in his own or his wife's name; but that a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, would be burdensome and oppressive, and should not be permitted.

Parker v. Wells, L. R. 18 Ch. D. 477, considered and followed.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant F. McD.

Held, that D. M. McD. should not have been ordered to produce these documents without F. McD. being called upon to show cause why they should not be produced.

W. Cassels, Q.C., and *C. J. Holman*, for D. M. McD.

MacGregor, for the plaintiff.

CHANCERY DIVISION.

[OSLER, J.A., AND FERGUSON, J., 11TH SEPTEMBER, 1886.]

WILSON v. GRAHAM.

Will—Construction—Life estate.

This was an appeal from the judgment of Proudfoot, J., in the matter of the construction of the following will:—"I do hereby bequeath to my beloved wife, E. K., all the real and personal property that I am possessed of after my funeral expenses and just debts are paid. My wish and desire is that she shall divide the said real estate or personal property, £50 to my eldest daughter S., £50 to my daughter E., the balance to my son W. Provided any more; if a daughter, £50 and if a son then the balance £50 to each of my daughters to be equally divided betwixt them after her decease."

The testator died October 15th, 1850, leaving him surviving one son and two daughters, and his widow, who was then pregnant with another child, who proved to be a daughter, the present plaintiff. The son William died intestate, unmarried and without issue.

Held, that the widow took a life estate under the will in both real and personal property, except what was necessary to pay the legacies to the daughters.

McCarthy, Q.C., and Fitzgerald, for the plaintiff.

Bruce, Q.C., and Burton, for the defendant.

[PROUDFOOT, J., 21ST SEPTEMBER, 1886.]

*In re BOUSTEAD & WARWICK.**Vendor and purchaser—Abstract—Title by possession—Evidence of.*

A vendor agreed to sell on the following amongst other conditions:—"The examination of title to be at the expense of the purchaser, who is to call for only those deeds and papers in my possession or under my control."

Held, that he was bound to deliver an abstract.

It appeared that one of the deeds in the chain of title had never been registered, and was lost; but the vendor and those under whom he claimed had been in possession for more than ten years, and solemn declarations of possession were tendered to the purchaser, who, however, insisted that they were not sufficient, as he had no means of cross-examining the declarants.

Held, that the vendor should give the evidence upon affidavit, whereupon the purchaser might cross-examine the deponents; but

Held, also, that the purchaser was not bound to accept affidavit evidence, but might insist upon his right to have the evidence of possession taken

viva voce; and in the event of his so electing, the vendor was to be at liberty to institute an action for specific performance.

Quære, whether the proceedings could be had under the Vendor and Purchaser Act.

A. Mills, for the vendor.

W. M. Hall, for the purchaser.

[28TH SEPTEMBER, 1886.]

HOSKIN v. THE TORONTO GENERAL TRUSTS CO.

Railway Co.—Expropriation—Award—Compensation—Price of land taken and depreciation to remainder—Who entitled to on death of land owner—Trustee of real estate or executor—Conversion.

P. being the owner of certain lands was served by a R. W. Co. with notice of expropriation and tendered \$3,635 for right of way and damage. Subsequently on the application of the Co., and with the consent of P.'s solicitor, the County Judge made an order fixing the amount of security to be given for damages and the price of the land at \$7,300, and giving the Co. possession upon their paying that amount into a bank to the joint credit of P. and the Co. The money was paid in pursuant thereto. An arbitration was then proceeded with and the compensation to be paid was fixed by the award at \$3,516, being \$924 for the land taken and \$2,592 for depreciation in value of the remaining land. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died after making his will by which he devised all his real estate to a trustee, and his personal estate, after certain specific bequests, to his executors. The plaintiff proved the will as executor and the defendants were appointed by an order of Court trustees in place of the trustee named in the will. Upon a special case for the opinion of the Court as to whether the plaintiff, as executor of the personal estate, or the defendants as trustees of the testator's land was or were entitled to the \$3,516 or any part thereof, or who should pay the costs of the case, it was,

Held, that as notice to treat was given, a claim made by the land owner refused by the Company, money paid into Court and possession taken by the Company, these circumstances, under the authority of *Nash v. The Worcester Improvement Commissioner*, 1 Jur. N. S. 973, would entitle the land owner to have specific performance against the Company, and the result follows that the land was converted into money, and the plaintiff entitled to the \$3,616 and the costs of the special case.

McMichael, Q.C., for the plaintiff.

Edgar, for the defendants.

[29TH SEPTEMBER, 1886.]

PECK v. POWELL.

POWELL v. PECK.

Interest—Money paid into Court—Contract—Rate of interest post diem.

When money claimed by a plaintiff under a contract is paid into Court to abide the result of an action, the plaintiff is entitled to the contract rate up to the time at which he could take the money out of Court; after that time Court interest only is recoverable.

When interest is payable by a contract, the rate fixed by the contract is recoverable only until maturity, after which date the statutory rate of six per cent. only can be charged, unless there is a clear and unambiguous term of the contract for payment of the contract rate after maturity.

This was an appeal from the Master's report, in which he had allowed interest on a mortgage at the rate named in the mortgage until the time fixed for payment, that date being after maturity of the mortgage.

PROUDFOOT, J.—Two questions were discussed in this case, 1st, whether a mortgagor, who had paid money into Court, secured by the mortgage, pending a suit to have it declared that he was not liable to pay the mortgage, and which was decided against him, should pay interest beyond the interest allowed by the Court; and 2nd, whether the mortgagee could recover 8 per cent. the rate of interest secured by the mortgage, after the time for payment mentioned in the mortgage had elapsed.

Both questions are covered by authority.

In *Sinclair v. The Great Eastern R. Co.*, L. R. 5 C. P. 391, a judgment had been recovered against the defendants on 9th September, 1869, for a large sum awarded by an arbitrator, and costs. On the 26th October, an order was made to stay proceedings till the fifth day of Michaelmas Term to give the defendants an opportunity to move to set aside the award, they bringing the money into Court to abide the event; and on the 8th November the motion was made, but no rule granted. The taxation of the plaintiff's costs was not finally completed till 29th January, 1870, and the plaintiff claimed interest till 2nd February, the day when the money was paid out.

The statute makes a judgment bear interest at four per cent. until satisfied. It was held that the plaintiff was entitled to interest on the money paid into Court till the 8th of November, the time when he might have taken it out.

In the present case the mortgage money bears interest by virtue of the covenant in the mortgage, and the plaintiff Peck paid it into Court as the price of getting a stay of proceedings till he contested the right of the defendant to the money. The defendant Powell could not get the money out of Court till the determination of those proceedings. He was kept out of the use of the money by the unsuccessful contention of the defendant, and both on principle and authority it seems to me the plaintiff Peck ought to pay interest beyond the Court interest.

The proviso for redemption in this case upon the mortgage dated the 1st June, 1877, is that the "mortgage is to be void on payment of \$3,000 with interest at eight per cent. per annum; the principal sum to be paid as follows:—\$1,000 on the 1st June, 1878, \$1,000 on the 1st June, 1879, and \$1,000 on the 1st June, 1880, with interest at the rate aforesaid on the whole unpaid principal, payable half yearly on the first days of December and June in each year until payment in full, to be computed from the first day of June instant, with interest at the same rate on all overdue payments of interest."

I am unable to distinguish this from *St. John v. Rykert*, 10 S. C. R. 278, 288. In that case the proviso was, "the said sum of \$3,000 on the 11th day of July, 1862, with interest at the rate of 24 per cent. per annum until paid." Strong, J., says, "In the absence of express words showing that the parties contemplated payment not *ad diem* but *post diem*, we ought not to presume that they intended to make provision for a breach of the covenant, and I should have thought that a proper and salutary construction, requiring as it does parties who stipulate for a larger amount of interest than the usual and legal rate to make clear by precise and unambiguous language what their intention was," and he then says that the point was covered by authority, referring to the case of the *European Central R. Co.*, 4 Ch. D. 33. The expression here, "until payment in full," is of no greater force than "until paid," and the clause as to interest on overdue payments of interest is fully satisfied by sales of interest in arrear during the time fixed for payment of the principal.

In conformity with that authority, I must hold that eight per cent. was not payable after the 1st June, 1880; after that time only the legal rate is recoverable.

Small v. Attwood, 3 Y. & C. Ex. 105, does not seem to apply to this case. It was a suit for specific performance, and the payments into Court were payments of interest.

From the case of *McDonald v. Elliott*, 12 Ont. R. 98, it seems that interest at the rate reserved after the money was payable might have been allotted to the mortgagee by way of damages, but the Master has expressly found that he has allowed the interest to the plaintiff Powell up to the day fixed by him for payment at the rate specified in the mortgage by virtue of the terms of the contract and not by way of damages.

As each party succeeds in part, there will be no costs.

[FERGUSON, J., 29TH JUNE, 1886.]

WATSON v. WESTLAKE.

Trademark—Infringement—Word in common use.

In January, 1885, the plaintiff registered as a trademark, under the Act of 1879, the words "Imperial Cough Drops," and now sued the defendant for infringement thereof by selling confectionery under the name "Imperial Cough Candy."

Held, that inasmuch as the evidence showed that the word "Imperial," as a designation or mark for cough drops or candy, was really public property, and a common brand or designation for candy long before the plaintiff's registration, the plaintiff had not the right to endeavor to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and the action must be dismissed.

Ridout, for the plaintiff.

Frazer, for the defendant.

[31st August, 1886.]

AMBROSE v. FRASER.

Married woman—Liability as assignee under covenant running with land.

On 23rd November, 1872, defendant F. executed a lease of certain lands to the plaintiff and another, covenanting that the plaintiff should be allowed to erect a malt house on the premises, and that at the expiration or other sooner determination of the demise F., his "heirs and assigns," would pay the plaintiff the value of the malt house, which in case of disagreement was to be determined by arbitration. The plaintiff erected a malt house. Afterwards, in 1878, his co-lessee transferred his interest in the lease to the plaintiff, and during the continuance of the term, F. conveyed the land in such manner as that it became vested in him and his co-defendant W. as trustees for his (F's) wife, in whom the beneficial interest was vested at the commencement of this action. It appeared that the marriage of F. and his wife took place in 1849, without any marriage contract or settlement, but that she had separate property at the time of the execution of the lease and had had such ever since, and now had it. After this the lands were sold under a mortgage of date prior to the lease, which absorbed the whole of the purchase money. The present action was now brought against F., Mrs. F. and W., to recover the amount awarded by the arbitrators who had been appointed to fix the value of the malt house. It further appeared and was urged by way of counter-claim that a certain sum of \$275 was due from the plaintiff in respect to rent unpaid and certain non-repairs.

Held, (i) that Mrs. F. was not liable in respect of her separate estate under the covenant, although the covenant was one which ran with the land, and the reversion had in equity been assigned by the covenantor to her during the term and before breach of the covenant. To hold that she was, would be to say that the separate property of a married woman married before 4th May, 1859, without any marriage contract or settlement, is bound by a contract made by her husband. For it was not pretended that she made any contract herself or that any credit was given her or anything whatever done in respect to, or on the faith of, her separate property or estate.

(ii) That the \$275 could not properly be set-off against the plaintiff's demand, the matters of the two not being in the same right; the said sum being due to the defendants as trustees, whereas the plaintiff's claim was against the defendant F. individually, and payable out of his own estate.

Moss, Q.C., and W. Barwick, for the plaintiff.

Osler, Q.C., and Gunther, for the defendant.

[6TH SEPTEMBER, 1886.]

JAMES v. ONTARIO AND QUEBEC RAILWAY CO.

Railways—The "taking"—Compensation.

In fixing compensation to a landowner for land expropriated by a Railway, the rule is as laid down in *Pierce on Railways* 211, and in *Ontario and Quebec Railway Co. v. Taylor*, 6 O. R. at p. 348, viz., to ascertain the value of the land of which it forms a part before the taking and the value of such land after taking, and the difference will be the actual value to the owner of the part taken, and "the taking" is properly fixed as at the date of the Company giving notice to the landowner of their intention of taking the lands.

It is not correct to say that the value should be taken as of a date prior to knowledge of intention to construct the railway.

Interest is properly allowed to the land-owner on the amount of his compensation from the time of the taking to the time of the award.

Wells, for the Railway Company.

Delamere and English, for the land-owner.

IN CHAMBERS.

[WILSON, C.J., 26TH OCTOBER, 1886.]

HALL v. PITZ.

Mechanic's lien—Costs—Scale of.

Action to enforce a mechanic's lien for \$142. At the time the suit was begun another lien was registered against the same property for \$130.

Held, that, as the aggregate amount of the two liens was over \$200, the action was properly brought in the High Court of Justice, and the costs should be on the scale of that Court, and it made no difference that the second lien holder had failed to substantiate his claim.

W. H. P. Clement, for the plaintiff.

F. Colquhoun, for the defendant Conrad.

[FERGUSON, J., 11TH OCTOBER, 1886.]

MURRAY v. WARNER.

Discovery—Rule 285—Examination of assignor by assignee.

The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum. The assignee was instructed by the creditors to resist the claim, and had himself no personal knowledge of the transaction between the plaintiff and his son, and could find no entry of it in the books or papers of A. S. M. Under these circumstances, an order under Rule 285 for the examination by the defendants of A. S. M. for discovery before the trial, was affirmed.

J. R. Roaf, for the plaintiff.

Holman, for the defendant.

[25th OCTOBER, 1886.]

PICKUP v. KINCAID.

Jury notice—Issue—Account—Discretion—R. S. O. cap. 50, sec. 255.

Where the action was upon a physician's bill for medical attendance, no equitable issue was raised, and it clearly appeared from the pleadings and examination of parties that the only matter really in dispute was the amount of the bill, a Judge in Chambers exercised the discretion given by R. S. O. cap 50, sec. 255. and struck out the defendants' jury notice.

*Hoyle*s, for the plaintiff.

George Macdonald, for the defendants.

FOSTER v. MOORE.

Lis pendens—Vacating registration.

In an action by a creditor of M. to set aside a conveyance to M.'s wife as fraudulent, the plaintiff registered a certificate of *lis pendens* against the lands covered by the conveyance, but did not serve the writ for eight months. The female defendant having agreed to sell the lands, the purchaser discovered the *lis pendens*; and the plaintiff then served the writ. The defendants were not aware of the *lis pendens* until then. An application was made to the Master in Chambers to discharge the *lis pendens* upon payment into Court of enough to secure the plaintiff's claim, and the order was made. The order also compelled the plaintiff to go to trial at the impending sittings.

Held, reversing the master's order, that there was no jurisdiction to discharge a *lis pendens*, the only remedy being to compel a speedy trial.

Bain, Q. C., for the plaintiff.

E. Douglas Armour, for the defendants.

[THE MASTER IN CHAMBERS, 1ST OCTOBER, 1886.]

GILMORE v. THE TOWNSHIP OF ORFORD.

Writ of summons—Indorsement of claim—Rule 5.

The writ of summons was issued against three defendants, A. B. & C.

The indorsement was that the plaintiff claimed to have declared void a deed from A. to B., and a deed from B. to A. C. was not mentioned at all in the indorsement, nor did it appear in any way upon the writ what the plaintiff claimed against him.

Upon motion to set aside the copy and service upon C.,

Held, that the indorsement was sufficient under Rule 5, and the motion was refused with costs.

H. J. Scott, for the motion.

Caswell, contra.

[4TH OCTOBER, 1886.]

TINNING v. GRAND TRUNK R. W. CO.

Notice of trial—Plaintiffs severing.

Since the Ontario Judicature Act, any one of the parties, plaintiffs or defendants, may give notice of trial, if the record be in a state to take it down.

Fowler, for the plaintiffs, R. T. and J. T.

MacGregor, for the plaintiff, T. T.

Aylesworth, for the defendants.

[28TH OCTOBER, 1886.]

BROMLEY v. GRAHAM.

Production—Privilege—Affidavit of documents—Criminal libel.

Held, that to obtain privilege for a document in an affidavit on production the grounds upon which it is claimed must be stated.

Held, also, that a statement in the affidavit, that according to the plaintiff's contention the document contained a libel, and therefore exposed the defendant to a criminal charge, did not protect the document; the defendant should have gone further and expressed his belief that the production of the document would expose him to a criminal charge.

Webb v. East, 5 Ex. D. 108 followed.

Holman, for the plaintiff.

Douglas Armour, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

[4TH AUGUST, 1885.]

FADER v. SMITH.

Trespass—Grant of sea shore by Provincial Government—Title held not to pass.

Plaintiff received a grant from the Provincial Government of the shore of a narrow cove or creek at St. Margaret's Bay. The cove or creek was one of a number of small inlets abounding on the shores of the Bay, not having the name or character of a public harbour, but had been used on several occasions by small vessels for the purpose of loading lumber.

Held, on the authority of *Holman v. Green*, 6 S. C. R. 707, that no title passed under the grant.

NEAL v. ALLAN.

Negligence—Defect that could not be discovered—Finding of jury on disputed fact—Amendment after argument.

Plaintiff was a passenger on defendant's steamer to Liverpool. On the voyage the rudder-post was carried away, disabling the steamer, and plaintiff returned to Halifax and was carried to England by another of defendant's steamers. The defect in the rudder-post was incapable of discovery before leaving port.

Held, that plaintiff could not recover damages for delay on the ground of negligence.

Plaintiff swore that he was ordered out of the steamer and prevented from proceeding in her to Liverpool, as other passengers did. Defendant's captain denied this. The Judge found generally for the plaintiff, and there was no contention that the finding was against the weight of evidence.

Held, that as this was a pure question of fact, the verdict found should not be disturbed, and that plaintiff should be allowed to amend his count inartistically drawn, to cover this claim.

McDonald, C. J., dissenting.

REGINA v. GRAHAM.

Stipendiary magistrate who is also a J. P. can act as such under Canada Temperance Act.

The stipendiary magistrate of New Glasgow sat as a Justice of the Peace with another justice, to try a case under the Canada Temperance Act, which provides that trials may be had before a Stipendiary Magistrate or any two other Justices of the Peace for the county.

Held, that no disqualification was intended by the word "other," and that the conviction was good.

Weatherbe, J., *dubitante*.

COSSMANN v. THE BRITISH AMERICA INSURANCE COMPANY.

Policy on freight—Necessity of notice of abandonment.

Plaintiff was insured on freight on a voyage from Mexico to New York. The vessel became leaky and was abandoned at sea, but was afterwards picked up by salvors and towed into Norfolk, Virginia. Plaintiff was aware of this, but gave no notice of abandonment.

Held, that defendants were entitled to notice of abandonment and that it was no answer to this to show that nothing would be gained by their interposing.

McDonald, C. J., dissenting.

Patch v. Pitman, followed.

COSSMAN v. WEST.

Constructive total loss—Notice of abandonment.

The insured vessel was, by the barratry of the master, pierced with auger holes and abandoned at sea, but was afterwards found by salvors sent out to search for her in the interest of the insurers on cargo, and was towed into port, where she lay in such a condition that one of the witnesses described the case as one of physical impossibility to repair. She was, however, repaired, but at a cost far exceeding her value.

Held, that the case was one of constructive total loss, requiring notice of abandonment.

McDonald, C. J., dissenting, held that the loss was absolute.

MCKAY v. ALLAN.

Plea to the jurisdiction in the County Court—Set-off.

Where a plaintiff was originally indebted to defendant in \$335.90, and defendant sold plaintiff a vessel for \$600, thus making the balance in plaintiff's favor \$224.10, which was afterwards increased to \$290.78, and then reduced by set-off of cash and goods amounting to \$179.05 to \$111.73.

Held, that there was no evidence to support the plea, the burden of which was on the defendant, that the plaintiff's claim was in excess of the jurisdiction of the County Court.

REGINA v. McFADDEN.

Canada Temperance Act, 1878—Conviction by Stipendiary Magistrate sustained—Certiorari—Must be applied for within six months from conviction—Imperial Act, 13 Geo. III., cap. 18, sec. 5—Costs—Procedendo.

Defendant was convicted before the Stipendiary Magistrate for Cornwallis Police District of a violation of the Canada Temperance Act, 1878, and the conviction having been brought up by *certiorari*, the Court was moved to set the conviction aside on the ground that the Act was not in force when it was made. The order for the *certiorari* was not moved for until after the lapse of twenty-two months from the date of conviction.

Held, that in making the conviction the Stipendiary Magistrate was exercising functions of a Justice of the Peace, and consequently, that the Imperial Act 13 Geo. III., cap. 18, sec. 5, limiting the granting of the writ of *certiorari* to six months after the date of the conviction, applied. The motion was refused with costs and a *procedendo* ordered.

Rigby, J., dissented.

[5TH AUGUST, 1885.]

THE NORTH AMERICA LIFE ASSURANCE COMPANY v. CRAIGEN.

Action for cancellation of policy of Life Insurance—Insurable interest—Policy obtained by insured on his own life for the benefit of another having no interest held good.

E. F. R. made application to the plaintiff company for, and obtained a policy of insurance upon his life for the benefit of defendant. The premiums were paid by E. F. R. and defendant had no knowledge of the

existence of the policy until after the death of the insured. Plaintiff applied to have the policy delivered up to be cancelled, on the ground that defendant had no interest, beneficial, pecuniary, or otherwise, in the life of the insured.

The policy having been applied for and the premiums paid in good faith by E. F. R.

Held, that defendant was entitled to recover, and that the cases where the insurance is applied for on the life of another and no insurable interest exists, did not apply.

DOULL v. THE WESTERN ASSURANCE COMPANY.

Amendment at trial—Waiver of conditions—Waiver of proof.

Defendants resisted payment of insurance on stock-in-trade of V. J. Gibson, on the ground, among others, that they had not had notice of a subsequent insurance as required by a condition of the policy. The subsequent insurance was bargained for by Gibson as insurance in the defendant company, but the agent applied for it to another company of which he was also the agent, and Gibson knew nothing of the change until he received his policy. When the loss occurred, defendants employed an agent who took possession of Gibson's books, agreed to leave to arbitrators as the only question to be decided, the amount covered by the policy—and treated the policy throughout as being in full force.

At the trial an amendment was granted more than six months after the loss, allowing Gibson to be added as a plaintiff, although the policy required the action to be brought within six months.

Held, that the amendment was properly granted.

Held, also, that the condition as to subsequent insurance was complied with, if waived, and that the defective proof of loss was waived.

PINEO v. GAVAZA.

Insolvent Act of 1875—Replevin against assignee.

Section 125 of the Insolvent Act of 1875 does not prevent an action of replevin against an assignee in insolvency to recover possession of goods conveyed under a bill of sale. The summary proceedings therein provided for are obligatory only in the case of duties devolving on the assignee by virtue of the Act.

DENISON v. GAVAZA.

Replevin for goods lent to insolvent—Demand.

Where goods were lent to the insolvent by plaintiff, and detained by the assignee,

Held, that they could be replevied without demand.

[8TH DECEMBER, 1885.]

FAIRBANKS v. HARTSHORN.

Order for particulars of trespass—Action dismissed for non-compliance.

Action dismissed for non-compliance or evasive compliance with an order requiring plaintiff to furnish particulars of alleged trespasses.

BANK OF NOVA SCOTIA v. BARSS.

Motion to dismiss suit.

Motion to dismiss plaintiff's cause for want of prosecution refused, plaintiff having been restrained by order at the instance of defendant from prosecuting the suit.

OWEN v. OCEAN MUTUAL MARINE INSURANCE COMPANY.

Construction of policy—Prohibition of St. Lawrence—Meaning of word "port."

The policy of marine insurance sued on contained a prohibition to use the Gulf of St. Lawrence between the 5th December and the 5th April without additional premium. A subsequent clause ran "not to use the ports of Schooner Pond, Blockhouse Mines and Chimney Corner, except during the months of June, July and August, the use of such ports not to vitiate this policy except during the time such ports are used."

Held, that this exception referred only to the ports named and not to the waters of the St. Lawrence, and that the use of the waters of the St. Lawrence during the prohibited period avoided the policy.

[5TH JANUARY, 1886.]

MACKINTOSH v. ALMON.

Proof by partner against separate estate of co-partner.

Under the Insolvent Act of 1885, section 80, as under the corresponding provisions of the English Act, a debt due by one partner in a firm to his co-partners can properly be proved against the separate estate of the debtor as soon as the joint debts of the partnership have been discharged.

MOIR v. THE SOVEREIGN FIRE INSURANCE COMPANY.

Misrepresentation—Concealment—Warranty—Pleadings.

Plaintiff was insured by defendant company on machinery in "a spool factory." At the time of the application there was machinery in the building for the manufacture of excelsior which was not, however, used for that purpose till some time after the policy was effected, though it was so used before the renewal of the policy and nothing was said to the insurers about such use. The jury found, in answer to questions, that the more hazardous risk of the two was the manufacture of spools, and that the risk was not increased by adding the manufacture of excelsior to that of spools in the same building. The Court refused to set aside the verdict for plaintiff entered on these findings, and

Held, that even assuming that there was a warranty against the manufacture of excelsior, it could not be relied on under the plea that the occupation of the premises was not truly described, and that plaintiff had represented that said building was occupied as a spool factory, whereas, in fact, the same was occupied in a much more dangerous and hazardous manner, to wit, etc.

McDonald, C.J., dissenting.

DOULL v. THE FIRE INSURANCE COMPANY.

Policy of insurance against fire—Construction of conditions—Over-valuation—Assured entitled to recover notwithstanding, in the absence of fraud.

The first condition of the policy of insurance against fire issued by the defendant company provided that "any application, survey, plan, or description of the property herein specified, made by or on behalf of the assured, whether referred to herein or not, will be considered a part hereof, and the basis of insurance under this policy and a warrant by the insured." The eighteenth condition read: "Fraudulent over-valuation

shall be a bar to any claim against the company, and, if the property insured is found, by arbitration or otherwise, to be over-valued in the survey and description on which the policy is founded, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured bears to the value given in such survey or description."

In the application the property insured was warranted to be of the value of \$25,000, but at the trial it was established that the value at the time the application was made did not exceed from \$17,000 to \$18,000.

Held, that both conditions must be read together, and that, in the absence of fraud, under the last condition the assured was entitled to recover for the actual loss notwithstanding the over-valuation.

In re THE ELDORADO UNION STORE COMPANY.

Winding up Provincial Company under Dominion Act—Requisites of petition—Restraining order.

The Eldorado Union Store Company, incorporated by Act of the Legislature of Nova Scotia, cap. 31, of 1880, is a trading company, and as such may be wound up under the provisions of the Dominion Act, cap. 23, 45 Vict., if insolvent.

In applying for a winding up order, it should be shown in the petition that the company is insolvent, the general statement "that the company is insolvent within the Act" not being sufficient.

A restraining order to prevent the execution of process at the instance of judgment creditors can only be applied for after presentation of the petition, and such petition can only be presented after four days' notice. Any earlier presentation or application is irregular.

THE CITY OF HALIFAX v. CLUSEN.

Ninety days and three months are not equivalent terms.

The statute enabling the City Council to make a by-law provides that imprisonment for ninety days may be annexed to the breach thereof. The by-law against Sunday trading provided for an imprisonment of three months.

Held, that the by-law was void, and a conviction thereunder was quashed accordingly.

KELLY v. RHODES.

Misdirection in not leaving question to jury.

Plaintiff was ejected from a building in possession of defendant by dropping him from a door or window upon a platform below, in conse-

quence of which plaintiff's wrist was fractured. The jury, in answer to questions, found that the injury was occasioned by defendant's act; that defendant, before removing him, had requested him to leave, and that in effecting his removal defendant did nothing more than was necessary for his removal.

Held, that there should be a new trial on the ground of misdirection in not leaving it to the jury to say whether the place at which plaintiff was ejected was a fit and suitable place for the purpose.

Weatherbe, J., dissenting.

McKAY v. THE GLANCE BAY MINING CO.

Recovery for work in addition to contract—Costs of argument disallowed.

To an action on the common counts defendant pleaded that the work was all done under a contract. It was clear that the original contract (which was for the construction of a boiler) had been materially departed from, and a large amount of work done that was not included in the contract. Defendants' agent swore that all the money paid was paid on the contract.

Held, that plaintiff was entitled to recover for the additional work, but not on the ground that the contract had been rescinded; and plaintiff having contended that the verdict for defendant should be set aside on this untenable ground, no costs of the argument were given.

NEW BRUNSWICK.

In the Supreme Court.

BURNS v. CASSELS.

Charter-Party—Voyage from England to New Brunswick—Ship not ready for sea—Dangers of the seas—Damage to ship—Deviation for repairs—Questions for jury.

By a charter-party, stating that his ship was tight, &c., and in every respect ready for sea, the defendant agreed to sail from Liverpool with all convenient speed, to B. in New Brunswick, and there load a cargo of deals for the plaintiff, and thence proceed to Liverpool—the dangers of the seas and navigation excepted. The ship was not ready for sea at the time the charter-party was entered into—not having any sails—and repairs were made to her while her ballast was being taken in, but she

sailed as soon as she had completed her ballasting. On the voyage, the ship was damaged by storms, and became leaky, and when off the coast of Cape Breton, and within about a day's sail from the port of Sydney, the master determined that he could not proceed to B. without repairing the ship, and he sailed to St. John, N. B., for that purpose, thinking, as he stated, that the repairs could be best made there. Repairs were made at St. John, but it was then too late in the season to go to B., on account of the ice, and the voyage was never completed. There was evidence that the ship could have been repaired at Sydney, and at other ports in Nova Scotia, nearer than St. John. The plaintiff recovered damages for not loading his deals, and carrying them to Liverpool.

Held, (i) That there was a breach of the charter-party in the ship not being ready for sea at that time, though if she sailed as soon as the ballast was completed, the plaintiff might only be entitled to nominal damages for such breach.

(ii) That it should have been left to the jury to find whether the necessary repairs to the ship could have been made at Sydney, or the other ports of Nova Scotia, and whether the master was justified in going to St. John for that purpose; and also, whether if the repairs could have been made at Sydney, &c., it would then have been too late in the season for the ship to proceed to B. and take in her cargo.

MORICE v. FORSTER.

Replevin—County Courts—Jurisdiction—Statement of value of goods in the declaration—Whether omission of is ground of demurrer—Power of Court in such a case to give judgment for defendant.

In actions of replevin in the County Court, the declaration should shew that the value of the goods does not exceed \$200; otherwise it will be demurrable.

Though a County Court has no jurisdiction to try a cause, it may nevertheless give judgment for the defendant on that ground, with costs.

CURRIE v. STAIRS.

Slander—Where meaning of words unambiguous—Evidence of what a witness understood by the words—Whether ground for new trial—Marriage—Proof of by witness—Authority to solemnize—Secular calling—1st Rev. Stat. c. 106—Pedigree—Entries in family bible—Secondary evidence.

In an action of slander for saying of the plaintiff—a married man—"He is as big a whore-dog as ever run," and, "to go and ask M. (a married woman) what he had done to her," the witness to whom the

words were spoken cannot be asked what he understood by the words without first proving that the word "whore-dog" has some local or technical meaning, or something different from its ordinary and natural meaning.

Semble, that there was no ambiguity about the meaning of the words, and therefore, though the witness should not have been asked what he understood by it, it was not a ground for setting aside a verdict for the plaintiff, the witness' answer being in accordance with the meaning ascribed to the word in the declaration.

A marriage may be proved by a person who was present at the ceremony. It is not necessary to produce the certificate of registry.

The Revised Statutes, c. 106, authorize any Christian minister, duly ordained according to the rites and ceremonies of the denomination to which he belongs, being a British subject, not engaged in any secular calling, and having charge of a congregation, to solemnize marriage.

Held, (the other requisites of the Statute being proved) that evidence that a person belonging to the denomination of Free Christian Baptists, claiming the right to solemnize marriage, was the son of a British subject residing in the Province, and that he himself also resided here at the time of his ordination, and was not shown ever to have resided elsewhere, was evidence that he was a British subject.

Proof that at the time of his ordination, the minister lived upon his farm, and that he afterwards farmed part of his time, and preached part of his time, is not evidence that he was engaged in a secular calling, within the meaning of the Statute.

Entries in a bible, or other family record, by deceased members of a family, are not evidence to prove *where* a member of the family was born.

Ex parte DOHERTY.

Summary conviction—Notice of appeal—Service on convicting Justice—Entry of appeal—Duty of Judge to hear—Mandamus.

Under the Dominion Act 33 Vict. cap. 27, it is sufficient to serve a notice of appeal on the convicting Justice, without stating that it is for the prosecutor.

If the appellant has taken the proper steps to perfect his appeal under the Act, it is the duty of the Clerk of the County Court to make any necessary entry of the appeal; and the Judge of the Court cannot refuse to hear the appeal because the appellant's attorney has entered it without authority, and improperly named a party as respondent.

The Judge may direct how an appeal should be entered.

REGINA v. PERLEY.

Summary conviction—Minute of judgment—Variance from formal conviction.

The minute of a conviction made under the Summary Convictions Act, 32 & 33 Vict. cap. 31, sec. 42, should state the adjudication of the Justices, both as to the amount of the fine, and the mode of enforcing it, whether by distress or imprisonment, so as to be a complete judgment in substance.

Therefore, where the minute of conviction under the Canada Temperance Act, 1878, stated only that the Justices adjudged the defendant to pay a fine of \$50 and costs, a conviction which was subsequently drawn up, after the Justices had separated, awarding distress in default of payment of the fine, and for want of distress, imprisonment for a certain time, was quashed—the Justices having no power, after the adjudication, to add to, or vary their judgment.

In re OULTON & ALLEN.

Arbitration—Award—Publication—Reference of a suit and all matters in difference—Finding on one issue only—Immateriality of other issues—Costs.

A. and B. being the respective owners of the mills on the same stream, A. brought an action against B. for damages to his mill by the erection of a dam by B., which, it was alleged, caused the water to flow back upon A.'s mill, further up the stream. B. pleaded: 1. Not guilty; 2. That A. was not possessed of the mill as alleged; 3. That A. was not entitled to the flow of water to his mill; 4. That B. was seized in fee of a mill, and for 20 years before the suit enjoyed the right to use the water of the stream to work his mill, which user was the alleged injury complained of. The suit, and all matters in difference were referred to arbitration, the costs of the action and of the arbitration, to be assessed and allowed by the arbitrators for the party in whose favor they should award, to be paid as they should direct. The arbitrators awarded that B. was not guilty of the grievances laid to his charge in the declaration, and directed that A. should pay him a certain sum as the costs of the action and of the arbitration, which, when paid, should be a final end and determination of all matters in difference.

Held, (i) That the award that B. was not guilty of the charge in the declaration was a determination of the suit; and that it was not necessary for the arbitrators to award upon the issues raised by the other pleas, which thereby became immaterial.

(ii) That the arbitrators having power to assess the costs, it was not necessary for them to award specifically upon the several issues raised by the pleas.

(iii) That B. had a right to withdraw from the consideration of the arbitrators, a claim which he made against A. for injury caused by him to B.'s mill.

An award need not be made in duplicate. If it is duly executed, and delivered to the party in whose favor it is made, it is sufficient to give a copy to the other party.

SOUTH-WEST BOOM CO. v. FAIRLEY.

Practice—County Court appeal—Dismissal where Appellant neglects to appear—Subsequent leave to hear.

Where an appeal was dismissed because no counsel appeared to support it when it was reached on the paper, the Court was equally divided on an application in the following Term to restore the case to the paper, and to allow the appeal to be argued—the only ground for the application being, that the appellant's counsel had forgotten to attend at the proper time.

Quære, whether after an appeal had been dismissed, the Court had power to restore.

MEDUXNIKIK BOOM CO. v. DALTON.

Meduxnikik Boom Company—Duties of Boom Master—Who liable for services in sorting lumber—Construction of Acts 8 Vict. cap. 49, and 27 Vict. cap. 1.

The Meduxnikik Boom Company was authorized by Act 8 Vict. c. 48, to erect a boom across the Meduxnikik river at or near its mouth, for the purpose of stopping and securing lumber floating down the same, for the use of the mills at the mouth of the river; provided that such boom should be so constructed as to admit the passage of rafts and boats, and to preserve the navigation of the river; but that no person should be allowed a passage through the boom with rafts, when the doing so would endanger the safety of other lumber in the boom. By sec. 4, the company was required to open the boom at reasonable times on request of the owners of lumber, and such owners were required to take their lumber out of the boom within a reasonable time after its coming there. By sec. 6, a toll was imposed on all lumber so boomed, and a lien thereon was

given to the company for payment of such boomage and other expenses. That Act was continued by 37 Vict. c. 61, with certain amendments, (*inter alia*) defining the times when the boom should be opened for the passage of lumber to the river St. John, (of which the Meduxnikik was a tributary,) and declaring that no boomage should be charged on lumber so passing through the boom, but that the owners of such lumber should, when required by the Boom-master, furnish a sufficient number of men to assist in sorting the lumber and passing it through the boom, and in case they neglected to do so, that the Boom-master might employ men for that purpose, and that the owners of such lumber should be liable for the expenses thereof in proportion to the lumber they respectively owned, and that the company should have a lien on the lumber for such expenses. The Governor of the Province was authorized to appoint the Boom-master, who was to receive a certain sum per day for his services while employed at the boom.

Held, (i) that the Act 37 Vict. cap. 61, imposes no liability on the owners of lumber passing through the boom, except to furnish men to assist in sorting the lumber in the boom and passing it through to the river St. John.

(ii) That the Boom-master could not maintain an action against an owner of such lumber for boomage under sec. 6 of the Act 8 Vict. cap. 49; but that his remedy was against the company.

Semble, that the toll imposed for boomage by sec. 6 of the Act of incorporation, applies only to lumber intended for the use of the mills.

MANITOBA

In the Queen's Bench.

HOOPER v. McBEAN.

Enlargement of summons for security for costs—Stay of proceedings.

A summons for security for costs was returnable the day before the day for which the argument of a demurrer had been set down. It had been served late on the previous day. An enlargement of the summons was granted, and the judge refused meanwhile to stay the argument of the demurrer.

REGINA v. ROBERTSON.

Game laws—Ultra vires.

The Provincial Statute 46 & 47 Vict. cap. 19, as amended by 47 Vict. cap. 10, sec. 25, sub-sec. (g) regulating the killing and possession of game at certain seasons of the year is *intra vires*, being within those clauses of the B. N. A. Act relating to "Property and Civil Rights" and "Matters of a merely local or private nature."

The provision that convictions for offences against the statute should not be removable by *certiorari* is also *intra vires*.

In re ANON.

Tax sale—Application for payment of overplus by mortgagee.

Land was sold for taxes and realized more than the amount due upon it. Upon an application by a mortgagee of the land for payment to him of the overplus,

Held, that notice of the application must be given to the mortgagor.

FAIR v. O'BRIEN.

Security for costs—Plaintiff's residence.

Although the rule is that upon an application for security for costs, upon the ground of the absence of the plaintiff, the absence must be positively sworn to; yet, where in the same action, the plaintiff had filed an affidavit describing himself as of a place within the jurisdiction,

Held, that the absence was sufficiently proved.

THOMPSON v. WALLACE.

Garnishee proceedings—Power of County Court Judge.

A County Court Judge has power not only to grant a garnishee attaching order, in a Queen's Bench case, but also to set the order aside if improperly issued.

ELLIOTT v. HOGAN.

Particulars of special damage.

To an action upon a promissory note given for the price of a wire binding machine, the defendant pleaded, by way of counter claim, a warranty given upon the sale of the machine by the plaintiff, and a breach of such warranty, claiming as damages, (i) loss of profits which he would have made by hiring the machine to others; (ii) expense incurred in endeavouring to make the machine fit for use, and (iii) expense to which he was put, and loss sustained, in and about the cutting and binding of his own corn.

Held, that particulars of the damage alleged should be given.

MOWAT v. CLEMENT.

Chattel mortgage—Good in part and bad in part—Signature to jurat—Future advances—Possession—Mortgage not within Act—Landlord and tenant—Distress as against sheriff.

The plaintiffs claimed certain horses under a chattel mortgage, which was expressed to be void upon (1) repayment of \$608.60 already advanced; (2) repayment of further sums to be advanced for the purpose of certain farming operations; (3) "and if the mortgagors do cultivate all the broken land upon all the said section during the present season, and reap and thresh the grain produced therefrom in a proper and workmanlike manner, and after the course of good husbandry, and do deliver for the benefit of the mortgagors at and not later than the 31st day of March next one half of all the grain arising from said sections 23 and 25; and if the mortgagors shall fall plough the said portions of all the said sections in a proper manner during the present season." No time was fixed for repayment. The mortgage was executed on the 12th May, 1883, and not filed until the 19th of the same month. The signature of the Justice of the Peace before whom the affidavit of execution was sworn, was placed over the jurat instead of underneath it.

Held, (i) that the mortgage although void as to the \$608.60 because of the delay in registration might nevertheless be good as to its other provisions.

(ii) That the position of the signature of the Justice of the Peace did not vitiate the mortgage.

(iii) As to the future advances the mortgage would be invalid under the Act, because the time of repayment was not stated to be within two years.

(iv) Possession taken by the mortgagees with knowledge of an execution in the sheriff's hands will not uphold an otherwise invalid chattel mortgage.

(v) The mortgage so far as it related to the delivery of one half of the crop and the fall ploughing was not within the Statute at all, and was therefore valid without registration.

A lease provided as part of the rent, that the lessees should fall plough the land. For default, the landlords on the 1st December, distrained certain horses. A sheriff under an execution against the tenants, seized the horses. In an action against the sheriff by the landlords,

Held, that proof of their possession under the lease was not sufficient. Evidence should have been given that the period for fall ploughing had expired.

ONTARIO BANK v. PAGE.

Garnishee attaching order—Style of cause—Rescinding Judge's order.

An application was made to set aside a garnishee attaching order obtained after judgment on the following grounds:

(i) Upon the ground that in the affidavit upon which it was granted the names of the garnishees appeared in the style of cause.

Held, that although irregular, these names were surplusage.

(ii) Upon the ground that in the style of cause in the order the plaintiff and defendant were not called "Judgment Creditor" and "Judgment Debtor," but "Plaintiff" and "Defendant."

Held, not a fatal objection.

(iii) The affidavit as to the garnishees being within the jurisdiction was as follows:—"I am informed, and have reason to believe" that so and so, naming them, are indebted, &c., to the extent of about \$120. "And the above named garnishees reside within, &c."

Held, sufficient.

(iv) The order attached debts to answer a Judgment "to be recovered;" whereas the judgment had already been recovered.

Held, amendable.

A Judge has power to rescind the *ex parte* order of another Judge.

CONWAY v. SCOTT,

Replevin—Action on bond—Original action still pending—Court of Assize.

To an action upon a replevin bond to prosecute "with effect," the defendant pleaded that the original action was still pending, and unde-

terminated. Replication, "that the suit referred to in the bond therein mentioned commenced in the Court of Queen's Bench for Manitoba, and was at and before the commencement of this action, determined in the manner following, that is to say :—The said suit was entered in due course on behalf of the plaintiff therein, the said Robert C. Scott, for trial at the Court of Assize and Nisi Prius in and for the Eastern Judicial District of the Province of Manitoba, at the sittings beginning on the fourth day of March, in the year 1884, and was on the 18th day of June, in the said year, brought on in due course for trial before Mr. Justice Taylor, the learned Judge then holding the said Court of Assize and Nisi Prius, and the said learned Judge thereupon decided and determined that the said Court of Queen's Bench, had no Jurisdiction over the said suit, and struck the said suit out of the list of suits then and there entered for trial at said Court of Assize and Nisi Prius, and declined to give any other Judgment therein, and no other judgment has been given therein."

Demurrer to the replication.

Held, that the replication was good.

THE CANADIAN LAW TIMES.

VOL. VI.

DECEMBER, 1886.

No. 14.

NOTES ON THE CONVEYANCING ACT, 1886.

BY the Conveyancing Act of 1886 certain changes of some importance are made in the law relating to mortgages, and we shall touch upon the chief sections of the Act which effect that change.

Assignments of Mortgages.

Section 7, sub-sec. 1:—“Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to assign and convey accordingly.”

Speaking of the necessity for this section in the English Conveyancing Act, Jessel, M. R. (a), says:—“We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a reconveyance on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a transfer of the mortgage security, but were not willing to take a security directly from the mortgagor dreading intermediate incumbrances. At that time the debt [being a chose in action] was not transferable,

(a) *Teervan v. Smith*, 20 Chy. D. at 728.

so that a power of attorney was necessary; therefore the old decisions were right in laying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a third person. Now the difficulty has been got rid of by making the debt transferable at law, so that no power of attorney is required, and all ground of objection on the part of a mortgagee to transfer the security is taken away."

The same learned Judge in the same case, explaining the operation of this section proceeds as follows:—"It says 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage he must also redeem all those who are between that mortgagee and himself. A puisne mortgagee indeed is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself and the ultimate equity of redemption. So that the words 'where a mortgagor is entitled to redeem' really includes every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem,' are inserted. They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then it says 'he shall have power to require the mortgagee instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person.' It is only 'instead of reconveying.' The section assumes two things; first, that the mortgagee is bound to reconvey to the person applying to him, and, secondly, that the

transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word 'reconvey' is the proper word to use; it is strictly a reconveyance. *If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee he is bound to reconvey it to him.* The second mortgagee is a mortgagor under the definition in the Act [sec. 8.] He is an assign of the mortgagor and is entitled to redeem. It appears to me that *no person can avail himself of the [7th section] who is not entitled to call for a reconveyance of the estate from the mortgagee.* The Act never intended to effect any change in the person who was entitled to call for a reconveyance.

There is another point which does not arise in the view which I take of the section but which I may mention. Every person who is behind the first mortgagee is entitled to redeem, and is a mortgagor within the meaning of the section, and if there are several successive mortgagees of the same mortgagor, which of them has a right in priority to the others to call upon the first mortgagee assign the mortgage? It must be that one who is next to him. The first incumbrancer has the first right to redeem, and it is *impossible to suppose that it was intended that a puisne mortgagee was to have the right to call for a transfer of the first mortgage, before one who is prior to himself.*" (b)

Sub-sec. 2:—"This section does not apply in the case of a mortgagee being or having been in possession."

This is because of the fact that where a mortgagee once takes possession of the mortgaged premises, he is ever thereafter bound to account not only for those rents and profits which he has actually received, or which he might have received but for his wilful default, from the mortgaged property, but he is also bound to account for the rents and profits which may be received or which should be received by any person to whom he may transfer the mortgage (c).

(b) And see *Alderson v. Elgey*, 26 Chy. D. 567.

(c) *Hall v. Heward*, 32 Chy. D. 430.

It would therefore be manifestly unfair to compel a mortgagee, who is in or has been in possession, to transfer his mortgage security to some third person, in whom he may perhaps have no confidence.

Sub-sec. 3.—“This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.”

It must be remembered in this connection, as also with reference to the word “mortgagor” wherever it is used in the Act, that by section 3, sub-sec. 4 of the Act, “mortgagor” is defined to include “any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate interest or right in the mortgaged property.”

Right to Inspect Title Deeds.

Section 8, (1).—“A mortgagor, as long as his right to redeem subsists, shall by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee’s costs and expenses in this behalf, to inspect and make copies or abstracts from the documents of title relating to the mortgaged property, in the custody or power of the mortgagee.”

(2) “This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.”

It will be observed that the right of inspection is given to the mortgagor from time to time and at all reasonable times after the making of the mortgage and so long as the right to redeem subsists.

Having regard to the enlarged definition of the term mortgagor which is given by the Act, it would appear that this right of inspection may be exercised by a doweress, or a tenant of the mortgagor whose term was created after the making of the mortgage, or an execution creditor of the mortgagor, or, in short, by any person who is either a subsequent incumbrancer, or who has any right title or

interest in or to the equity of redemption; for all such persons are entitled to redeem the mortgage and the interpretation clause, as we have seen, says that "mortgagor" includes any person who is entitled to redeem a mortgage.

It is submitted that it will be not merely the right but also the duty of the mortgagee, when he is called upon to produce his title deeds for inspection, by any person other than the original mortgagor, to require proper proof that the person calling for such production is a person who falls within the term mortgagor as defined by the Act, and that the mortgagee will be justified in procuring professional advice as to the sufficiency of the evidence offered by the applicant, and in treating his costs thereby incurred as a portion of his expenses payable under the Act by the mortgagor as a condition precedent to his right of inspection.

The mortgagee would probably also be justified in placing the title deeds in the custody of his solicitor whose charge for attending upon the inspection would be a proper expense to be paid by the mortgagor.

As this section applies only to mortgages made after the commencement of the Act, the state of the law before the commencement of the Act is still of importance, and this will be found set out in an article in 3 *Canadian Law Times* 565.

Insurance Money.

Section 9, (2) :—"All money payable on an insurance to a mortgagor, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received."

(2) "Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the mortgage money due under his mortgage."

This section confers certain new rights but imposes no new obligations upon the mortgagee.

The first sub-section applies only where the insurance moneys are payable to the mortgagor and therefore has no application to a case where the insurance moneys are by the policy made payable to the mortgagee.

The second sub-section would appear to apply to the right of appropriation in any case where the insurance moneys *have been received by the mortgagee* in respect of the mortgaged premises; but it is possible that it may be held to have a more extended application and may confer upon the mortgagee a right to decline to exercise the option given to him by the first sub-section, in a case where the insurance moneys are by the policy made payable to the mortgagor, and to require the mortgagor instead of making good the loss or damage in respect of which the money is received, to pay it over to the mortgagee to be applied in deduction of his mortgage claim, and if this latter right be conferred upon the mortgagee, it is probable that there will also be conferred upon him a right to intercept the moneys in question before they have in fact reached the hands of the mortgagor as this would in many cases be the only effectual method of enforcing his right of appropriation.

The rights of mortgagees with regard to the application of insurance moneys was affected by legislation prior to the passing of this Act.

Imperial Statute 14 Geo. III. cap. 78, section 83, provides that the directors of insurance companies are thereby required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings, which may thereafter be burnt down, demolished or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers or other person or persons who shall have insured such house or houses or other buildings have been guilty of fraud or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house or houses or other buildings so burnt down, demolished or damaged by fire; unless the party or parties claiming such insurance money shall

within sixty days next after his, her or their claim is adjusted give sufficient security to such directors that the said insurance moneys shall be laid out and expended as aforesaid; or unless the said insurance money shall be in that time settled and disposed of to and amongst all the contending parties to the satisfaction of such directors.

This section of the Imperial Act is of universal and not of locally circumscribed application, but it only applies to insurance moneys upon houses and buildings and does not apply to insurance of other property, such as trade fixtures (*d*).

Where a mortgage contains no covenant on the part of the mortgagor to insure, but he does insure and a loss by fire occurs, whereby the insurance money becomes payable, the mortgagee is entitled under this Act to have the insurance money laid out in rebuilding (*e*).

The proper course for the mortgagee to adopt is to bring action for an injunction to restrain the company from disposing of the money otherwise than as provided by the Statute, or to have the money paid into Court with a view to its being applied as the statute directs (*f*).

In order to entitle any person to the benefit of this section of the Imperial Act, he must make a distinct request to the insurance office to apply the policy money in rebuilding before they have settled with the person insuring (*g*).

V. C. Sir W. Page Wood says (*h*):—"I agree that a tenant from year to year, having insured would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year. Then the statute gives the landlord the right to require the money insured by his tenant's policy to be laid out in rebuilding. But I think it is too clear for argument that if the owner does not make this request before a settlement with the tenant he cannot

(*d*) *Ex. p. Gorely*, 4 D. J. & S. 477.

(*e*) *Stinson v. Pennock*, 14 Gr. 604.

(*f*) *Stinson v. Pennock*, *supra*.

(*g*) *Simpson v. Scottish Union Ins. Co.*, 1 Hcm. & M. 618.

(*h*) *Ibid.* p. 628.

insist upon it afterwards. . . . The Act of Parliament points to a request of this kind in order that the company may cause the money to be laid out in rebuilding, and I think it clear that they could not pay the money to the owner. The object of the provision is, in the interest of the public, to prevent persons from fraudulently setting fire to their houses, and this is a fraud which of course might be committed either by the owner or the tenant. The company themselves are the persons to rebuild in order that they may see that the money is really laid out in reinstating the property and that it is judiciously expended. It is quite true in this case that the value of the house is stated to have been in excess of the insurance ; but that does not affect the policy of the Act, which does not in any case give the owner the right to rebuild and claim the money but requires the work to be done by the company."

In *Rayner v. Preston* (i), Cotton L. J., treated it as a doubtful question whether a purchaser, who was liable to his vendor for the whole purchase money, even though the building might be burnt, is a person who can insist that the moneys payable under an insurance effected by the vendor be applied in rebuilding. Lord Justice James in the same case (j) was of opinion that such a person is within the provisions of the Act. He says :—" That Act seems to me to show that a policy of insurance on a house was considered by the Legislature as I believe it to be considered by the universal consensus of mankind to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of this Act."

Where a tenant of premises brought suit against an insurance company, to make them, under the provisions of this section, lay out in rebuilding the amount of a policy which the landlord of the premises had procured to be issued, and the landlord brought an action at law against

(i) 18 Chy. D. 7.

(j) At p. 15.

the company upon the policy, contending that the statute would in such a case only apply in favour of the tenant, where the tenant has himself effected the insurance and not where it had been effected by the landlord, Sir William Grant, M. R., expressed the opinion that these facts warranted the company in filing a bill of interpleader (*k*).

The statute of George is wider in its operation than section 9 of the Conveyancing Act. That section is limited to "money payable on an insurance to a mortgagor," and the only person who can require it to be applied in making good the loss or damage in respect of which the money is received is the mortgagee as defined by section 3, sub-sec. 4 of the Conveyancing Act, that is, the original mortgagee and "any person from time to time deriving title under the original mortgagee."

The right of the mortgagee, given by sub-section 2 of section 9 of the Conveyancing Act, to require the insurance moneys to be applied in discharge of the money due under the mortgage, is expressly made subject to any obligation to the contrary imposed by law or by special contract, and such right of the mortgagee is therefore subject to the rights of all persons who are entitled to the protection of the statute of George.

A covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insurance when an insurance is effected. Therefore where a mortgagor enters into such a covenant it is not necessary in the interest of the mortgagor that an assignment of the policy should be actually made; it is sufficient if the insurers, in case of loss, have notice of the existence of the covenant before they settle with the mortgagor (*l*).

This doctrine is even more broadly stated by the Supreme Court of the United States to the effect that where by his covenant or otherwise, a mortgagor is bound to insure the mortgaged property for the better security of a mortgagee, the latter has, to the extent of his interest in the property

(*k*) *Paris v. Gilham*, Coop. 56.

(*l*) *Greet v. Citizens Ins. Co.*, 27 Gr. 121; this was reversed on appeal on another ground not affecting this question, 5 App. R. 596.

destroyed, an equitable lien upon the money due on a policy taken out by the mortgagor, and this equity exists although the covenant in the mortgage provides that in case of the mortgagor's failure to procure the insurance and assign the policy, the mortgagee may procure it at the mortgagor's expense (m).

By R. S. O. cap. 136, sec. 12, it is provided that "The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on the loss or damage by fire happening, have the same advantage from any then subsisting insurance, relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him but not in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant."

Receipt for consideration money in conveyance.

Section '10:—"A receipt for consideration money or securities contained in the body of a conveyance shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being endorsed on the conveyance, and shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

This section extends the operation of R. S. O. cap. 109, sec. 1, sub-sec. 4 (n), which provides that "where a registered deed of conveyance acknowledges payment of the consideration money, such acknowledgment shall be sufficient evidence of payment except so far as such acknowledgment is proved to be inaccurate."

(m) *Wheeler v. Ins. Co.*, 101 U. S. 439; see *Gordon v. Ingram*, 23 L. J. Chy. 478; *Lees v. Whiteley*, L. R. 2 Eq. 143; *Ex. p. Caldwell*, L. R. 13 Eq. 188.

(n) V. & P. Act.

The term "conveyance" as defined by the Conveyancing Act, is a far wider and more comprehensive term than the "deed of conveyance" referred to in the sub-section of the Vendor and Purchaser Act above quoted.

The provision of the Vendor and Purchaser Act is inoperative unless the "deed of conveyance" be registered, while the operation of the Conveyancing Act is not thus limited in its effect, but extends as well to unregistered as to registered instruments and includes many instruments which are incapable of registration, for by the latter Act the term "conveyance" (unless a contrary intention appears) is defined to include "assignment, appointment, lease, settlement and other assurance and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property or any other dealing with or for any property," and "property" is by the same Act (unless a contrary intention appears) defined to include "real and personal property, and any debt, and any thing in action, and any other right or interest," so that the section in question, of the Conveyancing Act relates to dealings with personal as well as with real estate.

Before the passing of these enactments, the receipt given for consideration money in the body of a conveyance, was treated in equity as having little or no effect, from which arose the custom (now no longer necessary) of having a receipt clause endorsed upon the mortgage or other conveyance.

Before these enactments the absence of a receipt clause endorsed upon a conveyance, in a case where the consideration money had not in fact been paid, operated as notice to every person deriving title under the grantee, that the grantor had not been paid, and that he was therefore entitled to his lien, or other remedy against the property in priority to any rights which any third person could derive under such conveyance, and this notwithstanding the fact that the grantor had in the body of the conveyance acknowledged the receipt in full of all the consideration money (o).

(o) See *Greenslade v. Dare*, 20 Beav. 284-292, and *Kennedy v. Green*, 3 My. & K. at 716.

It is not improbable that this section of the Conveyancing Act has effected an important change in the law of mortgages, which may not have been contemplated by the framers of the Act, that is, with regard to the right of the assignee of a mortgage to hold the same as a security for the amount which the mortgage purports to secure, although such amount may not in fact have been advanced to the mortgagor.

For the proper consideration of this question it will be necessary for us to see what the law formerly was with regard to this question. Lord Chancellor Loughborough speaking of this question in *Matthews v. Wallwyn* (p) says: —“When the cause came on before me a case was referred to in which it was supposed Lord Thurlow had entertained an idea, but not decided, that the mortgagor having permitted the mortgage deed, without any indorsement upon it, to be in the possession of the mortgagee, an assignee taking from that mortgagee, might have a right to hold that mortgage, to the full extent of it, against the mortgagor who permitted the mortgagee to deal with and to make a security upon it. It was also supposed that in practice there is no occasion to make the mortgagor a party and in some cases it may not be possible to make him a party to the assignment; and that to hold that the assignee of a mortgage is bound to settle the accounts of the person, from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could get; and I think I have got the best. The result is that persons most conversant in conveyancing hold it extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due; that in fact it does happen that assignments of mortgage are taken without calling upon the mortgagor; but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured; and it is not in the course of transferring mortgages, but of

(p) 4 Ves. at 127.

raising money upon such securities; but no conveyancers of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party and being satisfied that the money was really due."

This view of the law was approved of by Lord Eldon in *Chambers v. Goldwin* (q), where he says:—"It is settled that if an assignment of a mortgage is taken without the intervention of the mortgagor, whatever the assignee pays, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee, and I think that rightly settled."

These decisions were approved of by the House of Lords in *Mangles v. Dixon* (r), and have been followed by numerous subsequent cases (s).

It was held in *Ryckman v. Canada Life Ass. Co.* (t), and *Smart v. McEwan* (u), that an assignee of a mortgage cannot set up a defence of purchase for value without notice.

The latter case was one of considerable hardship upon the assignee and the law was altered by statutory enactment (v) by which it is provided that "the purchaser in good faith of a mortgage may, to the extent of the mortgage (and except as against the mortgagor, his heirs, executors or administrators) set up the defence of purchase for value without notice in the same manner as a purchaser of the property mortgaged might do."

This statute enables the assignee of a mortgage to avail himself of the defence of purchase for value without notice in a contest between himself and any person other than the mortgagor, his heirs, executors or administrators, but with regard to a contest between the latter parties, the law was left just where it stood before the passing of the statute.

(q) 9 Ves. at 264.

(r) 3 H. L. C. at 737.

(s) See *Gooderham v. De Grassi*, 2 Gr. 135; *McPherson v. Dougan*, 9 Gr. 258; *Baskerville v. Otterson*, 20 Gr. 379; and *Elliott v. McConnell*, 21 Gr. 276.

(t) 17 Gr. at 557.

(u) 18 Gr. 623.

(v) R. S. O. cap. 95, sec. 8.

Now we have the provision of section 10 of the Conveyancing Act which says that the receipt in the body of a conveyance shall, in favour of a subsequent purchaser, not having notice that the consideration was not in fact paid, be sufficient evidence of the payment or giving of the whole amount thereof.

When we remember that "conveyance" is defined by that Act to include a mortgage, and that "purchaser" is defined by the Act to include "any person who for valuable consideration takes or deals for any property," and that "property" is defined by the Act to include "real and personal property, and any debt, and any thing in action, and any other right or interest," it would appear that the effect of the section in question is to enable the assignee of a mortgage to safely take his assignment relying upon the receipt in the body of the mortgage as evidence of the mortgage money having been originally advanced to the mortgagor, and to relieve him from the necessity of applying to the mortgagor for information upon that point.

This will however not render it safe for a person to take an assignment of a mortgage without procuring the mortgagor to join in the assignment, or otherwise acknowledge the state of the mortgage account, for although the money may all have been originally advanced, yet it may since have been paid off, in whole or in part, and against such a state of facts the statute would afford no protection.

It will be observed that the section in question enables the assignee to use the receipt in the body of the conveyance not merely as a defence against attack, but it shall be sufficient evidence of the payment, whether the assignee be plaintiff or defendant. The defence of purchase for value without notice, on the other hand, as its name implies, is capable of being used only as a shield and not as a weapon of attack.

Implied covenants in mortgages.

Section 13, (1):—"In a conveyance they shall, in the several cases in this section mentioned, be deemed to be included. and there shall in those several cases by virtue

of this Act be implied, covenants to the effect in this section stated, by the person or by each person who conveys, so far as regards the subject matter or share of subject matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants; or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say ; * * * *

(c) In a conveyance by way of mortgage, the following covenants by the person who *conveys*, and is expressed to *convey* as beneficial owner (namely). For payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage ;

Good title ;

Right to convey ;

That on default the mortgagee shall have quite possession of the land ;

Free from incumbrances ;

That the mortgagor will execute such further assurances of the said lands as may be requisite ; and

That the mortgagor has done no act to incumber the land mortgaged ;

According to the tenor and effect of the several and respective forms of covenant for the said purposes set forth in *The Revised Act respecting short Forms of Mortgages.*"

This provision of the Act appears to confer no very material benefit upon the mortgagee except that it enables him to shorten the form of mortgage by about 90 words, and that by virtue of sub-section 4 the implied covenants in question are annexed and incident to and go with the estate or interest of the implied covenantee, and are capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested. This may possibly in some cases give to persons subsequently interested in the property an advantage which they would not obtain under the covenants contained in the Act respecting Short Forms of Mortgages.

Another point in respect of which the implied covenants

provided for by the Act may sometimes be more convenient than those in the said Short Forms Act, is that by virtue of sub-section 5 the implied covenants may be varied or extended by deed, and as so varied or extended, they shall so far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed by the Act to be implied.

This provision gives a much more liberal power of variation than is given by the said Short Forms Act, in which the provision is that the parties "may introduce into or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column."

As to the effect of this latter provision see Leith's R. P. Statutes 103; *Re Gilchrist and Island* (w); and 6 *Canadian Law Times* 282; and as to the extent to which a covenant may be varied by a proviso, see *Williams v. Hathaway* (x).

It would however as a general rule appear to be safer in framing a general form of mortgage, to retain the express covenants under the provisions of the Short Forms Act, rather than to rely upon the implied covenants referred to in this section of the Conveyancing Act, as the latter are not raised by implication as against all persons who may join in a mortgage as mortgagors, but only as against a person who "*conveys and is expressed to convey as beneficial owner.*" This clause may well be held to exclude from the operation of the statute those persons who are frequently under the present rather loose practice joined as mortgagors for the purpose of obtaining the benefit of their covenants, although they may in fact have no estate or interest in the mortgaged property.

It is but proper to add that Messrs. Wolstenholme and Turner in their comments on the corresponding section of the English Act say with regard to this matter:—"It is not material that he actually has anything to convey, he

(w) 11 O. R. 537.

(x) 6 Chy. D. 544.

may be made in terms to convey simply for the purpose of giving an implied covenant. Therefore in the case of a conveyance by tenant for life and remainderman, if they both convey as beneficial owners, a covenant will be implied by both as to the whole fee."

It will be seen that the implied covenants are imported into a conveyance, by virtue of the Act, as against that person only who both "*conveys and is expressed to convey as beneficial owner.*"

To give the Act the operation ascribed to it by the learned English editors we should have to construe this clause as if the disjunctive "or" were used instead of the copulative "and."

It may be urged that a person who joins in an instrument in which he is "expressed to convey as beneficial owner" would be estopped from saying that he did not so convey in fact, but the phraseology of the above cited clause appears also to operate against this contention (y).

It will still be necessary to frame mortgage instruments under the provisions of the Act respecting Short Forms of Mortgage, even though it may be desired in certain particulars to take advantage of the provisions of the Conveyancing Act, unless the parties desire to throw doubt upon the right of the mortgagor to retain possession of the mortgaged property until default is made in payment under the mortgage, and unless they desire to dispense with the distress clause given under the Short Forms Act, and unless they desire with regard to the insurance clause and the power of sale usually contained in a mortgage to rely solely upon the provisions of 42 Vict. cap. 20; and it can scarcely be expected that any sane mortgagee will desire to rely upon the provisions of that Act which appears to be framed wholly in the interest of mortgagors.

We have already seen that in order to come within the provisions of the Act as to implied covenants the mortgagor

(y) Since the above was written the 5th edition of Davidson's Precedents and Forms in Conveyancing has appeared, in which the editor expresses (vol. 1, p. 280) an opinion upon the construction of the section in question in accord with that which is above stated; see the remarks thereon in 2 Law Quarterly Review 511.

must by the mortgage instrument be "expressed to convey as beneficial owner;" where therefore it is desired to take advantage of any of the implied covenants referred to in the Conveyancing Act, it will be convenient to insert in the granting clause of the ordinary Short Form of Mortgage the words "who conveys as beneficial owner," so that the clause will read "the mortgagor who conveys as beneficial owner doth grant, etc."

The effect of framing the instrument under both statutes will probably be found to be that as to all those matters with respect to which the draftsman has availed himself of the provisions of the Act respecting Short Forms of Mortgages by inserting the clauses of column one in Schedule B. to that Act; the express covenants as set forth in column two of said Schedule will be deemed to be operative rather than the implied covenants referred to in the Conveyancing Act, for *expressum facit cessare tacitum*; while the said implied covenants will be deemed to be included with respect to all those subject matters which in the particular instrument are not covered by the provisions of the Short Forms Act.

We have already pointed out the difference in effect between the same form of words when used in pursuance of the Short Forms Act and when used in pursuance of the provisions of the Conveyancing Act.

Another feature which should be noticed in connection with these implied covenants under the Conveyancing Act is that they are made to take effect in any "conveyance" made in the manner which is in the Act set forth; and that by the interpretation section of the Act "conveyance," unless a contrary intention appears includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of *any property or any other dealing with or for any property*: and that "property" unless a contrary intention appears, is defined to include real and personal property, and any debt, and any thing in action, and any other right or interest; therefore, unless a "contrary intention appears," the implied covenants referred to

in section 13 of the Act will be raised as well in instruments relating to personalty as in those relating to realty, while the covenants in question are by virtue of the Conveyancing Act raised "according to the tenor and effect of the several and respective forms of covenants," for the purposes referred to as set forth in the Short Forms Act and the latter forms of covenant are expressly made with reference to real estate and to that only.

This result follows from our Legislature having copied either too much or too little from the corresponding English Act in which no such incongruity arises.

Possibly an escape from the difficulty may be found by holding that the incongruity of the thing shows a "contrary intention" within the meaning of the Act, or that such contrary intention is shown by the fact that in the covenants relating to quiet possession, on default, and to further assurance, and to incumbrances, as set forth in the Short Forms Act, express reference is made to the "said lands," but such a holding would show that this section of the Act is useless with respect to the only class of cases, as to which its provisions were required, namely, the cases relating to personalty which are not now covered by the Short Form Acts. It is to be regretted that if the Legislature saw fit to pass the Act at all, it did not also see fit to insert at length the implied covenants which are set forth in the English Act instead of legislating as they have done by reference to a previous statute which does not harmonise with the Act.

(d) Sub-section 6 of section 13 provides for the raising of "further" implied covenants in a conveyance by way of mortgage or leasehold property as to the validity of the lease and the payment of rent and performance of covenants contained in the lease.

Sections 14 and 15 also apply to mortgages but do not call for any special remark.

A. H. MARSH.

EDITORIAL REVIEW.

Executors' Power of Sale.

In the case of *Yost v. Adams*, 13 App. R. 129, some confusion arises from faulty expression, in treating the omission of lands from the will as an intestacy as to these lands. The testator directed his executors to pay his debts. He then devised certain lands specifically, and omitted all mention of others. The question was whether the heir could make a good title to the latter, or whether the executors under the general charge of debts (which the Court held to exist) could sell them. If the testator died intestate as to these lands, then confessedly the executors could have nothing to do with them. But the general charge of debts brings all the testator's lands within the will, whether they are mentioned or not. And in this view it is not necessary to resort to the statutory powers of executors.

Whether section 19 of R. S. O. cap. 107, was rightly applied in this case may, with great deference for the Court, be doubted. The words of the section are, "if a testator who created such a charge as is described in the seventeenth section does not devise the real estate charge as aforesaid in such terms as that his whole estate and interest therein became vested in any trustee, etc." If the legislature had intended to provide for the case of a testator omitting wholly to devise his estate it would have been easy to say, "does not devise the real estate to any trustee." The words as they stand are pregnant with the signification that there is a limited devise to a trustee, i.e., that in devising the estate the testator does not devise it so that the whole estate vests in the trustee. A more clear method of expression would certainly have been as follows:—"Devises the real estate so that his whole estate does not vest, etc." That this is the real signification of the clause appears by contrasting it with section 17, which provides for the case of a devise for the whole of his estate without a power of sale.

Before the Act the Court could not attribute to a testator the intention to give to a trustee a power of sale where he devised to him a limited estate only: Watters R. P. Stat. 170-173, 214, 215. Was not this clause passed with the view of meeting this case? The learned writer just quoted treats the section as referring to a devise, and points out that by amendments the Act was not to extend to a devise in fee or in tail.

Interest post diem.

The decision in *Peck v. Powell*, ante p. 530, has had the effect of bringing the matter again before the Court. In *Muttlebury v. Stephens*, a note of which will be found in this number, the Registrar allowed only six per cent. per annum in computing the amount for six months in advance which the mortgagor was to pay for redemption of the mortgage, though the contract rate was seven per cent. On motion for a direction to him to allow seven per cent., the Chancellor made the order, on the ground which we pointed out in commenting upon *Peck v. Powell*, namely, that the Court may impose terms upon a defaulting mortgagor as the condition of redeeming.

It must always be taken for granted that the Court will impose equitable terms in such a case; and so we may well doubt whether if *St. John v. Rykert*, 10 S. C. R. 278, had been a case of redemption, twenty-four per cent. per annum would have been allowed. Where the default of the mortgagor accelerates the payment of the principal, and the day fixed for redemption is thus brought within the term during which the mortgagor agreed to pay the contract rate, he could not complain if the Court imposed upon him the payment of the rate which he himself had covenanted to pay. But where the due date of the mortgage has passed, a reasonable rate, which would be the then worth of money, would probably be fixed.

CORRESPONDENCE.

Mechanics' Liens and the Registry Act.

To the Editor of the CANADIAN LAW TIMES :—

SIR,—The communication under this heading in the November number of the *Canada Law Journal* will be read with interest. It directs attention to the very unsatisfactory state of the law of liens as controlled by the Registry Act. At present the conclusion from the authorities seems to be that where a mortgage is created or existing before the commencement of the work or the placing of the materials or machinery such mortgage loses priority to the extent indicated by sec. 7 of the Mechanics' Lien Act; but that where a mortgage is created after the commencement of the work, &c., it ranks before liens unless they are registered first: in other words that the Registry Act does apply to these last mentioned mortgages. It is hard, as has been pointed out, to reconcile this with sec. 26 of the Mechanics' Lien Act which enacts expressly that the Registry Act shall not apply to any lien except so far as is provided by that Act.

The provisions of the Registry Act which may be supposed to have been in the mind of the draughtsman are ss. 74, 78, 80 & 81 of R. S. O. cap. 111. Sec. 74 provides that every instrument affecting lands shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless registered before the registering of the instrument under which such subsequent purchaser or mortgagee claims.

Passing over the difficulty of applying this to a statutory lien which exists without registration and which till registered is not evidenced by any "instrument," and the question whether the fact of building visibly going on upon the

land is actual notice to the mortgagee (a), it appears that when the lien is registered the lienholder becomes a purchaser *pro tanto* and subject to this provision of the Registry Act. Until registration the wording of section 4 sub-section 3 of the Lien Act would seem to indicate that the lienholder is not within that Act. The 20th section allows the institution of a suit without the registration of a lien, and the position of a lienholder taking advantage of sec. 20 as against a mortgagee whose mortgage is registered subsequent to the commencement of the work has yet to be decided. It can hardly be said that he claims under the certificate of *lis pendens*, although that is an instrument as defined by the Registry Act, but rather under his unregistered lien. Sec. 78 makes registration of any instrument notice to all persons claiming any interest in the land subsequent to the registration.

Sec. 80 makes prior registration prevail unless in case of actual notice.

Sec. 81 provides that no equitable lien charge or interest affecting land shall be deemed valid as against a registered instrument executed by the same party his heirs or assigns.

The Mechanics' Lien Act (omitting subsequent legislation on minor points) as it at present exists only makes provision for applying the Registry Act in sec. 4 (already quoted), sec. 5, sec. 7 (by implication), sec. 20 (already quoted) and sec. 21. With these exceptions it is fair to assume that the Act excludes in other cases by its 26th section the provisions of the Registry Act given above.

The cases of *Douglas v. Chamberlain*, 25 Gr. 288, and *Richards v. Chamberlain*, 25 Gr. 402, may be supported on the ground that the Mechanics' Lien Act by sec. 7 (or the earlier corresponding section) does apply the Registry Act to the mortgage in question, though Spragge, C., in the latter case said it was not necessary so to decide. In *Hynes v. Smith*, 8 P. R. 73, the same learned judge decided broadly that the mortgagee whose mortgages were created and regis-

(a) This is considered and apparently decided in the negative in *Douglas v. Chamberlain*, 25 Gr. 288 ; *Richard v. Chamberlain*, 25 Gr. 402 ; *Graham v. Williams*, 9 O. R. 458.

tered subsequent to the commencement of the work but before the registration of the lien were prior incumbrances by virtue of the Registry Act. By no reasonable construction can sec. 7 (sec. 4 of the Act of 1874) be read as applying to mortgages created after the commencement of the work, and by the registration of the lien (sec. 4 sub-sec. 3 having applied to the case) the plaintiffs became purchasers *pro tanto* and within the provisions of the Registry Act.

Sec. 74 contemplates an antagonism between two "instruments." The lien is not an instrument until it is transmitted into the statement of claim and affidavit required by sec. 4 for registration. When it assumes that form and is executed, and not before, can section 74 apply. Can the mortgagee whose mortgage is created after the work begins but before the instrument evidencing the lien for registration is executed be said to be subsequent to that instrument? He cannot be unless that instrument relates back to the commencement of the work, and if so where is it provided that the Registry Act shall apply before registration? It would seem unreasonable to make the fact that the lien attaches from the commencement of the work a reason for limiting its operation to the date of its registration. From this dilemma the dissenting judgment of Mr. Justice Proudfoot in *Hynes v. Smith*, 27 Gr. 150, would free the question: "By the section 4 when the lien is registered the "Registry Act applies, and by this 26th section until "registered it does not apply."

Unfortunately the opposite view has prevailed. Mr. Justice Proudfoot himself gives effect to it in *Re Craig*, 3 C. L. T. 501, where he gave priority to the mortgages created after the work was begun over liens registered subsequent to the mortgages. This judgment is singular in ordering payment to the lien holders according to their priority of registration instead of *pro rata*. See R. S. O. cap. 120, sec. 17. From the report of *McVean v. Tiffin*, 13 App. R. 1, it appears that the same learned Judge in the Court below followed his earlier ruling as to advances on the mortgage made after the work begun, but this was overruled by the Court of Appeal.

It is quite true that sec. 78 of the Registry Act makes registration equivalent to notice, and therefore a registered mortgage is notice to the lien holders or those claiming by virtue of their liens an interest in the land, and *McVean v. Tiffin* appears to proceed very much on the ground taken by Spragge, C., in *Richards v. Chamberlain*, (*ante*)—which of course assumes the applicability of the Registry Act—that those who thus had notice might have protected themselves by registration and did not do so.

It ought not to be forgotten that the language of sec. 8 of the Registry Act is hardly applicable. The Mechanic's Lien is a statutory lien; but even if it were an equitable lien it is not created by the owner, but arises as it were *in invitum*, while the section in question contemplates the equitable lien as coming from the "same party" who executes the registered instrument.

In *Makins v. Robinson*, 6 O. R. 1, Mr. Justice Ferguson has under a different state of facts held that mere prior registration of a conveyance did not postpone a registered lien; and on principle it is difficult to see why if a mortgage by the owner when registered prior to a registered lien prevails over the latter, a conveyance should stand on a different footing.

The result of judicial decision is to place mortgages created subsequent to work having begun in a much more favourable position than mortgages created long prior thereto. The Registry Act, the application of which was intended to secure priority to lien holders, is made an excuse for postponing them, and a lien holder may find himself in a position to dispute for priority with a mortgage earlier by years than his claim, while he cannot ask the person who has contemporaneously with him advanced money as he has contributed his labour to share in an equal distribution of the proceeds of the property.

TORONTO.

FRANK E. HODGINS.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

LANGTRY v. DUMOULIN.

Rectory endowments—Rectory lands—29 & 30 Vict. cap. 16—Construction.

Held, affirming the judgment of Ferguson, J., 7 Ont. R. 499, and the judgment of the Chancery Division of the High Court of Justice for Ontario, 7 Ont. R. 644, that the lands in question in this case were Rectory lands within the meaning of the Act 29 & 30 Vict. cap. 16, entitled "An Act to provide for the sale of Rectory Lands in this Province."

Held, further, affirming the judgment of the Court of Appeal for Ontario, 11 App. R. 564, that the lands were held by the rector of the Church of St. James, in the city of Toronto, as a corporation sole for his own use and not in trust for the vestry and churchwardens or parishioners of the rectory or parish of St. James, and such vestry and churchwardens had therefore no *locus standi in curia* with respect to said lands.

Howland and Arnoldi, for the appellants.

H. Cameron, Q.C., for the Synod of Toronto.

MacLennan, Q.C., and *Moss, Q.C.*, for the rectors of the city of Toronto.

Alfred Hoskin, Q.C., for rectors of the township of York.

THOMSON v. DYMENT.

Contract for sale of timber—Acceptance of part—Right to reject remainder as not being according to contract.

T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place was named for the delivery of the lumber, and it was shipped from the mills

where it was sawn to T. at Hamilton. T. accepted a number of car loads at Hamilton, but rejected others because a portion of the lumber in each of them was not, as he alleged, of the size and quality contracted for.

Held, Fournier and Henry, JJ., dissenting, affirming the judgment of the Court of Appeal, 12 App. R. 569, that T. had no right to reject the lumber, his only remedy for the deficiency being to obtain a reduction of the price or damages for non-delivery according to the contract.

Bain, Q.C., and *Kappelle*, for the appellant.

McCarthy, Q.C., for the respondent.

KINLOCH v. SCRIBNER.

Chattel Mortgage Act—Stock-in-trade—Open and notorious sale—Actual and continued change of possession—R. S. O. cap. 119, sec. 5—Hiring of former owner as clerk.

S. having purchased from one M., a trader, his stock-in-trade, merchandize and effects, took delivery of the keys of the premises in which M. had carried on business and entered into possession, and immediately advertised the business in his own name in the newspaper of the place. The day after he so took possession he dismissed the clerk, who had remained after the change, and hired M. in his place, and M. continued for some time to sell goods in the store as he had done before the sale, but in the capacity of clerk to S.

Held, that notwithstanding the hiring of M. by the purchaser, there was "an actual and continued change of possession" in the goods in the store which satisfied the requirements of R. S. O. cap. 119, sec. 5. See 12 App. R. 367.

Ontario Bank v. Wilcox, 43 U. C. R. 460, distinguished.

McCarthy, Q.C., and *Dougall, Q.C.*, for the appellants.

Cassels, Q.C., and *Holman*, for the respondents.

McCALL v. McDONALD.

Insolvency—Chattel Mortgage—Action by creditor to set aside—Fraudulent preference.

C., a trader, mortgaged his stock, and a few days afterwards executed an assignment in trust for the benefit of his creditors. This action was by a creditor, on behalf of himself and the other creditors except the mortgagees, to set this mortgage aside as a fraudulent preference in favour of the mortgagees.

Held, affirming the judgment of the Court below 12 App. R. 593, that the action could be properly brought without joining the mortgagees as plaintiffs, and that the mortgage could be set aside without attacking the assignment in trust.

Held, also, reversing the decision of the Court below, that the proceeds of the sale of the mortgaged property which had been paid into Court to abide the result of the appeal, should be paid over to the assignee under the trust deed to be distributed as part of the assets of the estate, and not dealt with by the Court as ordered by the Court of Appeal. The decree of the Court of Appeal was varied, and the judgment of Ferguson, J., 9 Ont. R. 185, restored.

Robinson, Q.C., and Geo. Kerr, for the appellants.

S. H. Blake, Q.C., and McDonald, Q.C., for the respondents.

BEATTY v. NEELON.

Company—Action by shareholders of, against promoters—Misrepresentation—Laches—Right of action in company.

An action was brought by B. and others, shareholders in a joint stock company, against N. and others who had been the promoters of the company for damages caused by the fraudulent misrepresentation, as was alleged, of the said promoters in the formation of the company. The plaintiffs and defendants had been owners of rival lines of steamboats, and the plaintiffs claimed that the defendants had proposed to the plaintiffs to amalgamate the two lines and form a joint stock company, and as an inducement to the plaintiffs to consent to such amalgamation the defendants had represented that they had a four years' contract with the Government of Canada for carrying the mails from Windsor to Duluth, whereas the fact was that they had only a verbal contract for carrying such mails from year to year which was discontinued after the formation of the company, which was the misrepresentation complained of, and also that the defendants had received a bonus from the town of Windsor, and refused to pay to the plaintiffs their portion of the same as agreed upon when the said company was formed.

The evidence at the trial showed that the plaintiffs were aware of the true state of the said mail contract a short time after the company was formed, but had allowed the business of the company to go on for four years before taking proceedings against the promoters.

Held, Strong, J., dissenting, that the alleged injury, if any, was to the company and not to the plaintiffs, and the action should have been brought in the name of the company, or on behalf of all the shareholders.

Held, also, affirming the judgment of the Court below, 12 App. R. 50, that if the action could be brought by the plaintiffs, the long delay and

the conduct of the plaintiffs in allowing the business of the company to proceed without making a speedy claim for redress, disentitled them to relief.

McCarthy, Q.C., and McDonald, Q.C., for the appellants.

Robinson, Q.C., and Cassels, Q.C., for the respondents.

QUEBEC.]

McGREEVY v. REGINAM.

Petition of right—46 Vict. cap. 27 (Q)—Appeal to Supreme Court of Canada.

Held, that the provisions of the Supreme and Exchequer Courts Acts relating to appeals from the Province of Quebec apply to cases arising under the Petition of Right Act of the Province of Quebec, 46 Vict. cap. 27.

Malhiot, Q.C., for the motion.

Irvine, Q.C., contra.

EXCHEQUER COURT.]

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA.

Statement of claim in Exchequer Court—Insufficiency of—Summons to fix trial and hearing discharged—Appeal to Exchequer Court from order of Judge in Chambers.

A statement of claim was filed by the Attorney-General for the Province of Ontario in the Exchequer Court of Canada praying, that "it may be declared that the personal property of persons dying domiciled within the Province of Ontario intestate, and leaving no next of kin or other person entitled thereto, other than Her Majesty, belongs to the Province or to Her Majesty in trust for the Province." The Attorney-General for the Dominion of Canada in answer to the statement of claim prayed, "that it be declared that the personal property of persons who have died intestate in Ontario since Confederation leaving no next of kin or other person entitled thereto, except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."

No reply was filed, and on an application to Mr. Justice Gwynne in Chambers for a summons for an order to fix the time and place of trial or hearing the summons was discharged, on the ground that the case did not present a proper case for the decision of the Court. A motion was then made before the Exchequer Court, Sir W. J. Ritchie, C. J.,

presiding, by way of appeal from the order of Mr. Justice Gwynne, for an order to fix the time and place of trial. The motion was dismissed without costs on the ground that he was not prepared to interfere with the order of another Judge of the same Court.

Held, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy, in reference to which the Court could be properly asked to adjudge or which a judgment of the Court could affect.

Irving, Q.C., for appellant.

Burbridge, Q.C., for respondent.

ONTARIO.

High Court of Justice. QUEEN'S BENCH DIVISION.

REGINA v. SWALWELL.

[WILSON, C. J.]

Livery stables—Con. Mun. Act, 1883, sec. 570—By-law imposing license fee—Conviction for contravening—Certiorari—Recognizance—49 Vict. cap. 49, sec. 8 (D.)—“Shall no longer apply,” meaning of.

Held, that since the passing of the Act, 49 Vict. cap. 49, sec. 8, there is no longer any necessity for a defendant on removal by *certiorari* of a conviction against him to enter into the recognizance as to costs formerly required.

Held also, that the words “shall no longer apply” in section 8, mean that from the day of the passing of the statute, the Imperial Act shall no longer apply, not that the Imperial Act shall cease to have application in Canada upon a general order being passed under section 6 of the Canadian Act.

The Consolidated Municipal Act, 1883, section 510, authorizes the licensing of owners of livery stables, and of horses, etc., for hire. A by-law passed under this section required every person owning or keeping a livery stable or letting out horses, etc., for hire, to pay a license fee. The defendant was convicted under this by-law, for that he “did keep horses, etc., for hire,” without having paid the license fee.

Held, that the conviction was in conformity with both statute and by-law.

Watson, for the motion.

Aylesworth, contra.

REGINA v. BRADY.

Canada Temperance Act, 1878—Presumption from the finding of appliances mentioned in section 119—Variance between conviction and minute of adjudication—Power of Amendment—Certiorari—Power of Court to dispose of the case on the merits on return of, under secs. 117, 118.

The defendant was charged with the offence of keeping liquor for sale contrary to the provisions of the second part of the Canada Temperance Act. Evidence was given of the finding of certain of the appliances mentioned in section 119.

Held, that apart from the presumption created by that section upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge.

The magistrate at the close of the case made a minute of adjudication, in which he stated that he found the defendant guilty and imposed a fine of fifty dollars and costs, to be paid by a date named, and awarded imprisonment for thirty days in default of payment. Afterwards, when drawing up the formal conviction, the magistrate adopted the form I 1, in the schedule to the Summary Convictions Act, directing that in default of payment by the day named, the penalty should be levied by distress and sale, and awarding imprisonment for thirty days in default of sufficient distress.

Held (i) that the conviction in the form I 1, was the proper conviction to be made, under the combined provisions of sections 107 of the Canada Temperance Act, and sections 42 and 57 of the Summary Convictions Act, and not the form I 2, to which form the minute of adjudication apparently pointed.

(ii) That the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it.

(iii) That undersections 117 and 118 of the Canada Temperance Act, the Court, upon the motion to quash, might dispose of the case upon the merits upon the material returned with the *certiorari*, and that in this case the conviction, being warranted by the evidence, ought to be affirmed and the minute of adjudication amended so as to conform to it.

[CAMERON, C.J., 12TH, 16TH AND 21ST OCTOBER, 1886.]

BERTRAM v. MASSEY.

Trial—Reading depositions and evidence under commission—Practice.

During the course of the trial it appeared that the plaintiff had been present at the examination of the defendant before special examiners. and when he was in the box his counsel proposed to ask him questions as to certain admissions made by the defendant on such examination.

Cameron, C.J., ruled that admissions made under such circumstances could be proved only by reading those parts of the depositions containing them.

The learned judge also ruled (i) that the plaintiff was entitled to read portions of the evidence of a foreign witness who had been examined under commission without reading the whole of his evidence.

(ii) That the defendant could not read the cross-examination of one of the foreign witnesses taken under commission without reading his evidence in chief.

The defendant read part of the plaintiff's depositions taken before trial and closed his case. Counsel for the plaintiff proposed to read in reply other portions of the plaintiff's depositions in explanation of those parts read by the defendant.

The learned judge ruled that they could not be read in reply, but should have been read immediately after the portions read by the defendant, and the plaintiff should be put in the box to explain if necessary.

Robinson, Q.C., S. H. Blake, Q.C., and Lash, Q.C., for the plaintiff.

McCarthy, Q.C., Watson and Smoke, for the defendant.

COMMON PLEAS DIVISION.

REGINA v. MARTIN.

Conviction—Beating drum contrary to by-law.

A conviction found that the defendant on the 16th May, 1886, created a disturbance on the public streets of the village of Lakefield, by beating a drum, etc., contrary to a certain by-law of the village. The information was in like terms, except that the act was laid as done on Sunday, 16th May. The by-law under which the conviction was had was as follows: "The firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises on the public streets of Lakefield on the Sabbath day, are strictly prohibited." The evidence was given by a person who said that he saw the defendant playing the drum on the street on the day in question.

Held, that the conviction was bad, in not alleging that the beating of the drum was without any just or lawful excuse.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 6TH SEPTEMBER, 1886.]

BLACK v. BESSE.

Exclusion of witnesses at trial—Witness remaining in Court—Rejection of his evidence—New trial.

At the trial of an action the witnesses were put out of Court, and before the case was closed the defendant's counsel tendered a witness

who had remained in Court, but the presiding Judge refused to allow him to be examined.

Per Boyd, C. There must be a new trial.

Per Proudfoot, J. The practice is to receive such evidence, but with care.

S. H. Blake, Q.C., and J. W. McCullough, for the motion.

Chapple, contra.

[22ND SEPTEMBER, 1886.]

MERCHANTS' BANK OF CANADA v. MCKAY.

Mortgage—Security for indebtedness—Sureties—Change of original securities—Release of sureties.

K. & Co. were customers of the plaintiff, and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for their present indebtedness, and a redemption clause providing for the payment of all bills, notes and paper, upon which K. & Co. were then liable, together with all substitutions and alterations thereof, and all indebtedness in respect of the same being a continuing security, notwithstanding any change in the membership of the firm.

The Bank did business with K. & Co. in two different ways, one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held their notes, and another by discounting K. & Co.'s own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers. At the time the mortgage was given all the notes held by the Bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitution nearly all the notes held at the date of the mortgage had been replaced by K. & Co. (in renewals and substitutions) by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the Bank to foreclose the mortgage, the mortgagors claimed that they as sureties were discharged by the Bank's action.

Held, that the Bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice to the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the Bank.

Held, that *prima facie* the Bank was liable to the extent of the face value of the securities surrendered ; but that they could reduce that by evidence as they might be advised.

Rae, for the plaintiffs.

Moss, Q.C., and *Stewart*, for the defendants.

FURLONG v. REID.

Assignment for benefit of creditors—Chattel Mortgage—Proof of consideration—Onus of proof—New trial.

In an interpleader issue, where the plaintiffs were a chattel mortgagee and an assignee for the benefit of creditors of the judgment debtor, to try the right to the proceeds of the goods sold by the sheriff, the assignee was examined and showed that he was a brother and an employee of the assignor, and that all the money he had collected under the assignment had been used by him in carrying on the assignor's business and not in payment of creditors, and the mortgagee put in and proved the chattel mortgage, but gave no evidence of a debt due or of pressure used. On this the learned Judge charged the jury that, in his opinion there was no evidence of a debt or of pressure, and that if they believed the assignment was made for the purpose of defeating or delaying creditors it was bad, and he refused to allow the consideration to be proved after the plaintiffs closed their case, and the jury brought in a verdict for the defendant.

On a motion to enter a verdict for plaintiffs or a new trial it was

Held, per Boyd, C. The plaintiff proved enough to cast the burthen of attack on the defendant. Proof of the mortgage, duly executed, showed that the property and title to the goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by showing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There was no evidence that the wife knew of the husband's insolvency and concurred with him in an attempt to gain a preference at the expense of the other creditors.

Per Proudfoot, J. The mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and insolvency could not be a circumstance shifting the onus of proof, and the production of the mortgage would be *prima facie* evidence, and as the jury had found on the evidence sufficient to justify their verdict that the assignment was not honestly made the verdict should not be interfered with on that point, but as the plaintiff the trustee appeared to have been misled and was refused leave to supplement his evidence, a new trial should be given.

E. Furlong, the trustee plaintiff in person.

F. F. Fitzgerald, for the assignee plaintiff.

J. Parkes, for the defendant.

HALL v. FARQUHARSON.

Tax sale—Improper assessment—Payment of taxes—Non-resident lands—Admissibility of evidence to correct roll.

H. being the owner of four islands called them O. F. B. and C. islands, and improved O. by building a house, etc., on it. O. had previously been known to some people as island D. and was described by that name in the patent. H. ascertained what taxes he owed and paid all that was demanded. The assessor from general information assessed the islands, and so assessed island D. on the non-resident roll for the years in question. The taxes were not paid on island D. and it was consequently sold at a tax sale. It was shewn that F. island was assessed by mistake as the improved island on the resident roll, and O. island on the non-resident roll as island D.

Held, affirming the judgment of Ferguson, J., under the provisions of the Assessment Act, R. S. O. cap. 180, that as to errors in non-resident land assessments the county treasurer is not bound by the roll, but can receive evidence and correct errors therein, and that in this case he could have done so as to the "incorrect description" and the "erroneous charge" based thereon, and that the taxes were paid, and "satisfactory proof" being made on these points it would have been his duty to stay the sale, and if so, it was the duty of the Court to interfere and undo the wrong.

The Assessment Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books and the sale was set aside.

McCarthy, Q.C., and Pepler, for the appeal.

McMichael, Q.C., contra.

[17TH NOVEMBER, 1886.]

GORDON v. GORDON.

Administration—Mortgages of specific devisees—General execution creditors—Priority—Salvage money—Appeal from report—Varying report on matter not appealed against.

The judgment of Proudfoot, J., 11 Ont. R. 611, affirmed as to ranking of appellants. There should have been no alteration in the amount found due by the Master to the appellants when there was no appeal against his report on that ground.

Moss, Q.C., for the appeal.

E. D. Armour, contra.

[BOYD, C., 30TH NOVEMBER, 1886.]

MUTTLEBURY v. STEPHENS.

Mortgage action—Redemption—Interest, rate of.

In an action of foreclosure on a mortgage payable in 1893, where payment of the principal was accelerated by default, it was held that interest should be computed at the mortgage rate of seven per cent. per annum, when fixing the amount to be paid by the mortgagor for redemption.

F. E. Hodgins, for the plaintiff.

[PROUDFOOT, J., 29TH SEPTEMBER, 1886.]

In re SIMMONS & DALTON.

Electoral Franchise Act—Revising officer—Mandamus—Notice to voter—Notice to revising officer—Jurisdiction of Provincial Courts to issue mandamus.

A revising officer under the *Electoral Franchise Act*, 48 & 49 Vict. cap. 40, declined to entertain the application of S. to have the name of D. struck off the Voters' List on the ground that the notice to D. provided for by section 26 of the Act was not proved, and that the notice to the revising officer provided for by the same section was not given to him in time.

On an application for a mandamus to the revising officer, although it appeared that no copy of the notice to D. was kept and no notice was served to produce the original, it was shown by two witnesses that a notice to D. filled up on a printed form with his name, address and the objection to his vote had been mailed to him by a prepaid registered letter on 26th June, for the sitting of the revising officer on 12th July following, and the certificate of registration was produced, although the witnesses had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the revising officer.

Held, that in the absence of evidence to the contrary, such proof was sufficient.

The notice to the revising officer was left with his clerk at his office during the absence from town of the revising officer on Monday, 28th June, and on his return on the afternoon of that day, he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said that what was done was sufficient.

Held, that the last day for service for the sitting for the final revision to be held on 12th July, was Sunday, 27th June, but that under section 2, sub-section 2, of the Act, the time was extended, and S. had all the next day, and that the notice was well given on Monday.

Held, also, that the service of the notice on the clerk of the revising officer was under sections 19 and 26 a sufficient "depositing with" the revising officer to satisfy the statute, and the conduct of the revising officer amounted to an adoption of the action of the clerk and was equivalent to personal service if such were required by the statute.

It was contended that the revising officer was an appointee of the Dominion Government, and that his sittings were sittings of a Court of Record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him.

Held, that the Dominion Parliament had by the Electoral Franchise Act interfered with civil rights in this Province, and made no provision for a Court to superintend the conduct of the officials, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such a Court is created the Provincial Courts by virtue of their inherent jurisdiction have a right to superintend the discharge of their duties by any inferior officer or tribunal.

Held, also, that the revising officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and that in holding that notice to produce the notice to D. should have been given, which were not findings of facts, and such mistakes or errors were not such decisions as to prevent the granting of the writ of mandamus. If he had found as a matter of fact that notice was not given to D., there might have been some difficulty in interfering with his conclusion.

The *Centre Wellington Case*, 44 U. C. R. 132, referred to and distinguished.

Aylesworth, for the motion.

Osler, Q.C., and *O'Neill*, contra.

[FERGUSON, J., 31st AUGUST, 1886.]

BOULTON v. BLAKE.

Lease—Covenant to pay rent and taxes—Conveyance of part of demised premises—Assignment by lessee—Action for a part of the rent and taxes—Appointment—Eviction—Local improvement taxes—Additions to taxes in arrear.

J. B. leased certain lots A. B. C. D. E. & F. with other lands to the defendant. E. R. C. also at the same time leased lot G. and other lands to the defendant. E. R. C. then conveyed his reversion in lot G. to I. B.,

and I. F. conveyed the other lands mentioned in his lease to S. A. H. The defendant assigned all his interest in both leases to J. S. McM., and J. S. McM. assigned all his interest in lots A. B. C. D. E. F. and G. to J. C. Both J. S. McM. and J. C. paid rent to I. B., and after his death to his executrix, the plaintiff. The rents of lots A. B. C. D. E. F. and G. fell into arrear, and the taxes also were left unpaid. The plaintiff then recovered judgment in an action of ejectment against J. C. and took possession of the lots.

This action was brought to recover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, and it was contended that as the action was brought against the original lessee who had assigned the lease and was on the covenant, resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent to these lots.

Held, following *The Mayor, etc., of Swansea, v. Thomas*, L. R. 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover.

Held, also, that there was no eviction of the defendant by the lessor.

Held, also, on the evidence, that although defendant might be a surety for the assignee there was no release of the assignee, and consequently no discharge of the surety.

Held, also, following *Barnes v. Bellamy*, 44 U. C. R. 303, that the rent accrued from day to day and was apportionable in respect of time accordingly.

Held, also, that under the wording of the covenant to pay "all taxes, rates, duties and assessments whatsoever * * * now charged or hereafter to be charged upon the said demised premises," the defendant was liable for local improvement taxes and for the additions made under the Assessment Act year by year to the amount of the taxes in arrear, or additions made by the municipality.

Moss, Q.C., for the plaintiff.

Osler, Q.C., and *Small*, for the defendant.

[NOVEMBER, 1886.]

In Re ONTARIO LOAN AND SAVINGS CO. & POWERS.

Will, construction of—Appointment—Estate.

A. by his will devised as follows:—"I give and bequeath to my nephew B. and C. his wife [describing the land] to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit." C. the wife died, and after her death B. conveyed to one of his children D. B. and D. then mortgaged to the Co. and the Co. sold to E. under the power of sale in the mortgage.

Held, that B. and C. took an estate for life only ; that the appointment in favour of one child to the exclusion of the rest was not a valid appointment ; and that the title offered was not one that the purchaser could be compelled to accept.

S. H. Blake, Q.C., for the vendors.

Robert Armour, for the purchaser.

[27TH NOVEMBER, 1886.]

CAMPBELL v. MARTIN.

Contempt of court—Imprisonment—Discharge—Costs

Where a person has been imprisoned for contempt of court, the proper order upon an application for his discharge, is that he be continued in prison for a definite period, unless the costs are sooner paid.

Hoyles, for the defendant.

C. J. Holman, for the plaintiff.

In Re S.—INFANTS.

Habeas Corpus—Return—Infant, custody of—R. S. O. cap. 130, sec. 1.

A return was made by the mother of the infants, in whose custody they were, to a writ of *habeas corpus* obtained by the father with the object of compelling the delivery of the custody to him. The return stated that the infants were all under twelve, the age mentioned in R. S. O. cap. 130, sec. 1.

Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law.

Re Murdock, 9 P. R. 132, explained and followed.

J. MacLennan, Q.C., and *H. J. Scott, Q.C.*, for the father.

S. H. Blake, Q.C., and *H. Cassels*, for the mother.

IN CHAMBERS.

[WILSON, C.J., 2ND NOVEMBER, 1886.]

*In Re WALSH v. ELLIOTT.**Prohibition—Division Court—Amount—Liquidation.*

The plaintiff sued in a Division Court for \$114, \$75 on a promissory note, and \$39 on a bill of costs, of which the amount was not ascertained by any act of the defendant.

Held, that the claim was within the jurisdiction of a Division Court.

Vogt v. Boyle, 8 P. R. 249, applied and followed.

J. B. Clarke, for the defendant.

Shepley, for the plaintiff.

[5TH NOVEMBER, 1886.]

NEWCOMBE v. McLUBAN.

Order after action dismissed—Statement of claim—Extending time—Master in Chambers—Jurisdiction of—Rule 462.

An order of the 4th October, 1886, extended the time for delivery of statement of claim till the 12th October, but provided that if it was not so delivered the action should stand dismissed with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action.

Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462, vacating the judgment and further extending the time for delivering the statement; and the Master in Chambers had jurisdiction to make such an order.

H. Symons, for the defendant.

J. B. Clarke, for the plaintiff.

In Re PAQUETTE.

County Judge, jurisdiction of—Prohibition—48 Vict. cap. 26, sec. 6 (O.)—Persona designata.

A judge of a County Court, acting under the authority of 48 Vict. cap. 26, sec. 6 (O.), removed an assignee for creditors and substituted another

assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee, for contempt.

Held, that the judge in acting under this statute was not exercising the powers of the County Court, but an independent statutory jurisdiction, as *persona designata*, and had therefore no power to direct the issue of a writ of attachment; and prohibition was directed.

Aylesworth, for the first assignee.

Shepley, for the second assignee.

[11TH NOVEMBER, 1886.]

REGINA v. ORGAN.

Vagrant—Conviction—Evidence—32 & 33 Vict. cap. 28, sec. 1.

The defendant was summarily convicted under 32 & 33 Vict. cap. 28, sec. 1, as a person who had no peaceable profession or calling to maintain himself by, but who did for the most part support himself by crime, etc.

The evidence showed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves, but the witnesses did not positively say that he supported himself by crime.

Held, that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as showed he was pursuing crime.

Bigelow, for the defendant.

[BOYD, C. J., 29TH NOVEMBER, 1886.]

In re LEGARIE v. THE CANADA LOAN AND BANKING CO.

Division court—Prohibition—Equitable claim—Surplus in hands of mortgagee.

Held, that a Division Court has jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$400.

Such a claim is an equitable cause of action for money had and received.

Washington, for the defendants.

C. J. Holman, for the plaintiffs.

[FERGUSON, J., 22ND OCTOBER, 1886.]

ARCHER v. SEVERN.

Executors—Erection of monument—Just allowance.

The testator by his will gave all his residuary estate to four of his children, after payment thereof by his executors of his just debts, funeral and testamentary expenses, and "the expenses incident to the purchase of, and erection of a suitable tablet over or nigh to the vault or grave wherein I may be interred, such grave, vault or tablet not to exceed \$1,500, and also of monumental tablets or stones, and to the erection thereof at, over, or near to the graves of my deceased wives."

At the time of his death, the testator owned two small lots in the Necropolis, Toronto, in one of which were buried three wives who had predeceased him. Many years before his death he had erected on this lot an inexpensive monument to one of these wives. The executors, one of whom was one of the four residuary beneficiaries, purchased an expensive lot in Mount Pleasant Cemetery, Toronto, and in it the testator was buried, and to it were removed the remains of the three wives; and one monument was there erected to the memory of the testator and the three wives, costing in all about \$3,000. At his death the testator was worth nearly \$200,000.

The Master in Ordinary allowed the expenditure by the executors as proper. Two of the residuary beneficiaries appealed from this allowance, on the ground that the Master should not have allowed more than the sum of \$1,500 for the erection of such monument.

Held, that the allowance by the Master should not be disturbed.

Moss, Q.C., J. H. Macdonald, Q.C., and Snelling, for the appellants.

S. H. Blake, Q.C., and Lash, Q.C., for the respondents.

H. C.

[1ST NOVEMBER, 1886.]

DEVEREUX v. KEARNS.

Partition—Dowress as applicant—Allotting dower—Sale.

A widow entitled to dower, though not assigned, is entitled to maintain proceedings for partition.

Rody v. Rody, 1 C. L. T. 146, overruled.

But where one only of several is desirous of partition, the proper proceeding is to have part allotted to him, leaving the others to hold jointly or in common.

Hobson v. Sherwood, 4 Beav. 184, followed.

In the present case as the plaintiff, a dowress, had already taken proceedings under the Dower Act to have her dower assigned, and confessedly only applied for a partition with the object of having a sale of the land, which the other parties interested opposed, the application for partition was refused with costs.

W. F. W. Creelman, for the plaintiff.

J. Hoskin, Q.C., for the infant defendant.

Langton, for the adult defendants.

RIDDELL v. MCKAY.

Security for costs—Amount of—Rules 429, 431.

Where no reason was shown for reducing the amount of security required by a *præcipe* order for security for costs, issued under Rule 431, an order amending the *præcipe* order by reducing the amount to \$200, the security to be in the form of money paid into Court, was reversed on appeal.

Held, that the provisions of Rule 429, do not so apply as to authorize the reduction of the security required by Rule 431.

Aylesworth, for the defendant.

W. H. P. Clement, for the plaintiff.

[2ND NOVEMBER, 1886.]

CAMPBELL v. MARTIN.

Motion, enlargement of—Violating terms.

The plaintiff asked an enlargement of a motion for the purpose of answering it by affidavits. The enlargement was granted upon terms, and it appeared when the motion came up again that the plaintiff had violated the terms.

Held, that the plaintiff was not entitled to read the affidavits.

Hoyles, for the defendant.

Holman, for the plaintiff.

[8TH NOVEMBER, 1886.]

*In Re PEAK.**Master in Chambers, jurisdiction of—Mechanic's lien—Vacating registration of.*

The Master in Chambers has jurisdiction to entertain a motion under R. S. O. cap. 120, sec. 23, to vacate the registration of a Mechanic's Lien, where the amount is over \$200.

J. B. Clarke, for the land-owner.

F. E. Hodgins, for the lien-holder.

*In Re McDOUGALL TRUSTS.**Infants' money—Payment out of Court—Directions of will.*

A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into Court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' share and expend the interest for their maintenance. It was admitted by the official guardian, on behalf of the infants, that there was no reason to anticipate danger to the money if paid out to the executor.

Held, that the will of the testatrix should be respected, and the infants' moneys paid out to the executor.

Watson, for the executor.

J. Hoskin, Q.C., for the infants.

[10TH NOVEMBER, 1886.]

TAYLOR v. SISTERS OF CHARITY OF OTTAWA.

Appeal—New affidavits—Ex parte order.

Upon an appeal by the defendants from an order obtained *ex parte* by the plaintiff, the defendants were permitted to read affidavits which were not before the Master who made the order appealed from.

Hoyles, for the defendants.

W. M. Douglas, for the plaintiff.

[16TH NOVEMBER, 1886.]

CHAMBERLAIN v. CHAMBERLEN.

Pleading—Claim arising since action—Set-off—Counter-claim—Striking out inapplicable defence.

The Judicature Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off, although it may be made the subject of counter-claim.

Therefore, where a defence of money due to defendants by the plaintiff, part of which accrued before and part after action brought, was pleaded as a set-off, the order of a local judge directing the defendants to amend by confining their plea of set-off to those debts which occurred before the commencement of the action, was affirmed.

A defence which is wholly inapplicable may be struck out, unless amended, although it be neither scandalous nor tending to prejudice, embarrass, or delay.

E. Douglas Armour, for the appellants.

Edminson, for the respondent.

[18TH NOVEMBER, 1886.]

DOMINION BANK v. HEFFERNAN.

Costs, scale of—Attacking fraudulent conveyance—Amount of claim—Creditors' Relief Act, 1880.

The plaintiffs had judgment and execution against one of the defendants for less than \$200 and were seeking, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other as fraudulent. There were other executions in the hands of the sheriff amounting to more than \$200, and the action was dismissed at the trial.

Held, that if the plaintiffs had been successful, all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors Relief Act would have applied to the case, and therefore the amount of the subject matter involved exceeded \$200, and the costs were taxable on the High Court scale.

C. J. Holman, for the defendants.

Leeming, for the plaintiff.

[ROSE, J., 26TH NOVEMBER, 1886.]

PURVES v. SLATER.

*Foreign defendant—Assets within the jurisdiction—Debts due defendant—
Rule 45 (e).*

Debts due to the defendant by persons resident in Ontario are "assets which may be rendered liable to the judgment" within the meaning of Rule 45 (e).

Shepley, for the defendant.

Walter Read, for the plaintiff.

[THE MASTER IN CHAMBERS, 10TH NOVEMBER, 1886.]

SEYMOUR v. DEMARSH.

Local venue—Foreclosure—Possession—Ejectment—Rule 254.

An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, and the venue need not therefore in such an action be laid in the county where the lands lie.

Hoyles, for the defendant.

H. J. Scott, Q.C., for the plaintiff.

NEW BRUNSWICK.

In the Supreme Court.

REGINA v. WADDELL.

*Extradition—Treaty of Washington, 1842—Canadian Extradition Act, 1877
—Trial for offence other than that for which prisoner was surrendered.*

The 10th Article of the Treaty of Washington between Great Britain and the United States provides for the delivery up to justice of persons charged with the commission of certain crimes in one of those countries, who shall be found in the territories of the other; and directs what shall be sufficient evidence of criminality to justify the issue of a warrant for

the surrender of the fugitive. The Canadian Extradition Act, 40 Vict. cap. 25, sec. 23, enacts that when any person accused of an extradition crime is surrendered by a Foreign State in pursuance of any arrangement, he shall not, until after he has been restored to, or had an opportunity of returning to the Foreign State, be subject, in contravention of any terms of the arrangement, to any prosecution in Canada, for any other offence committed prior to his surrender, for which he should not, under the arrangement, be prosecuted. A person imprisoned in this Province on a charge of having committed the crime of arson (an extraditable crime), escaped, and fled to the States, and on requisition, made to the Government of that country, under the Treaty of Washington, was surrendered to this Province—the warrant of surrender stating that he was to be tried for the crime of which he was so accused. He was convicted here of the crime charged, and while he was a prisoner under that conviction, was tried for the breach of prison (not an extraditable offence) committed before he escaped to the United States.

Held, Per Allen, C.J., Fraser and Tuck, JJ., Wetmore, Palmer and King, JJ., dissenting, (i) that there being no provision in the treaty of Washington on the subject, such trial was not “in contravention of any terms of the arrangement” for the surrender of fugitives, between Great Britain and the United States.

(ii) That the warrant stating that the fugitive was surrendered to be tried for the crime of which he was accused, was the act of the United States authority only, and was not an “arrangement” within the Canadian Extradition Act, 1877, and therefore that the trial for prison breach was sustainable.

Per Wetmore, Palmer and King, JJ. The trial of the prisoner for breach of prison was in contravention of the fair construction of the treaty of Washington, as it had always been claimed by Great Britain; and was also contrary to the express terms of the warrant on which the fugitive had been surrendered.

McGIBBON v. BURPEE.

Evidence—Destroyed letter—Secondary evidence of the contents of part—Inability of witness to remember the rest—Handwriting—Expert testimony.

Held, that a person who had received a letter part only of which, he stated, related to the subject-matter of the suit, might, after the destruction of the letter, testify as to the contents of that part, though he could not state the words of the remainder of it, except generally that it had no reference to the question involved in the suit.

Quære, whether a witness who has no knowledge of the handwriting of a party, can, after comparing a signature with a writing admitted to be genuine, speak as an expert as to his belief whether such signature and the genuine writing were made by the same person.

COULTHARD v. CAVERHILL.

*Debtor and Creditor—Novation—Substitution of liability of third person—
Discharge of principal debtor—Consideration—Statute of Frauds.*

The defendant being indebted to the plaintiff, it was verbally agreed between them and G., for whom the defendant was cutting lumber, that the plaintiff should discharge the defendant and accept G. as his paymaster, and G. thereupon promised to pay the plaintiff the amount due him from the defendant. G. was not indebted to the defendant at the time, or afterwards.

Held, Per Allen, C.J., Palmer and King, JJ., that there was a sufficient consideration for G.'s promise, and that the defendant's indebtedness to the plaintiff was extinguished.

Per Wetmore, Fraser and Tuck, JJ. G.'s promise, not being in writing, was void under the Statute of Frauds, and the indebtedness was not extinguished.

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